The Judicialization of Politics in Canada and the Policy Legacy of the McLachlin Court (2000-2017)

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A Thesis

in

The Department

of

Political Science

Presented in Partial Fulfillment of the Requirements

for the Degree of

Master of Arts (Political Science) at

Concordia University

Montreal, Quebec, Canada

September 2019

CONCORDIA UNIVERSITY
School of Graduate Studies

This is to certify that the thesis prepared

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Entitled: The Judicialization of Politics in Canada and the Policy Legacy of the McLachlin Court (2000-2017)

and submitted in partial fulfillment of the requirements for the degree of

Master of Arts (Political Science)

complies with the regulations of the University and meets the accepted standards with respect to originality and quality.

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ABSTRACT

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Since the birth of the *Charter of Rights and Freedoms* in 1982, the Supreme Court has been charged with being an extremely activist Court responsible for initiating fundamental policy reform via its remedial powers (s. 24(1)). Relatively few studies exist, however, which attempt to evaluate the truth of these claims. Stated differently, few have studied whether judicial invalidation actually results in fundamental policy change. Utilizing dialogue theory as the framework of analysis, complemented with a modified approach to Matthew Hall's (2010) theory of final appellate courts as 'implementer-dependent' institutions, the study attempts to fill this gap. By conducting six case studies of salient and controversial issues of public policy, and by analyzing the corresponding legislative sequels introduced by federal or provincial governments in response to judicial invalidation, the study attempts to measure the policy impact and legacy of the McLachlin Court, and to understand the conditions under which the Supreme Court behaves as a powerful policymaking institution. The thesis demonstrates that the Court's policy clout is contingent on whether the federal or provincial legislatures, as the designers and implementers of public policy, create conditions favorable to judicial policymaking and the judicialization of politics. The findings illustrate that, given the right set of circumstances – namely when the Court delivers a decision that proves to be unpopular with the non-judicial actors responsible for enforcing the judicial ruling, and, as a result, when the responsible

legislature introduces reply legislation that challenges, or ineffectively implements, the Court's decision – judicial power will be rather limited.

ACKNOWLEDGEMENTS

This work would have not been possible without the help of Professor James Kelly, my thesis supervisor and mentor. Thank you for pushing me to reach my full potential, and for granting me the freedom to explore myself academically. Your knowledge and passion for the subject is invaluable, and I am extremely honored and humbled to have learned from the best.

I would also like to take this opportunity to thank Professor Daniel Salée for agreeing to be a member of the thesis committee, and for providing me with the guidance and feedback necessary to improve and grow. Furthermore, I would like to thank all of my professors and the staff at Concordia University who have made my graduate experience a memorable one, and who have given me the tools necessary to succeed.

To my best friends Cristina and Alexia, thank you for constantly and generously supporting and encouraging me, and for being a part of both my hardships and successes; for being my voice of reason, for the constant pep-talks, and for showing me endless and unconditional love.

Finally, I must express my sincerest thanks to my family – the people who have always encouraged me to pursue my ambitions, goals and dreams, and who have walked alongside me every step of the way. To my mom, thank you for being the glue that holds this family together. Without your strength, patience, guidance and love, I would not be where I am today. Much of my success I owe to you, and, for that, I will be forever grateful.

To my sisters, Bianca and Liana, thank you for being the epitome of strong, confident and independent women, and for constantly reminding me that the sky is truly the limit. Thank you for being my people; for listening to me read my work over and over again, and for your unwavering love, encouragement and support.

To my fierce angel, thank you for encouraging me to pursue a higher education, for always believing in me, and for guiding me from above. I am the woman I am today because of the person you raised me to be. You are greatly missed, but will never be forgotten.

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Introduction

The adoption of bills of rights worldwide has sparked scholarly interest in studying the powers of final appellate courts. The birth of the Canadian *Charter of Rights and Freedoms* in 1982 is certainly no exception.[1] As the 'umpires of federalism,' courts have traditionally acted as mediators in disputes arising from issues related to the division of powers and, in this respect, have always played an important constitutional role.[2] April 27th, 1982, however, marked the beginning of a new era for Canadian courts. Armed with strong remedial powers, they were now in a position to transform into a powerful policymaking institution.

In Canada, a system structured by the principle of parliamentary democracy, judicial power and policymaking is troubling because it empowers the courts – an unelected and unaccountable institution incapable of addressing complex issues of public policy, and which lack the information required to balance competing interests in society[3] – to claim "responsibility for the community's future."[4] In other words, right-wing/conservative critics have questioned the legitimacy of judicial review on the grounds that section 24(1) of the *Charter* (the remedial provision) allows Canadian courts to participate in salient and controversial issues of public policy, which, in their opinion, are debates better left to the discretion of federal and/or provincial legislatures.[5] According to conservative critics, the Supreme Court's activist approach

[1] Leclair 2004, 545; Hogg 1987, 88.
[2] Kelly and Manfredi 2009, 6.
[3] Macfarlane 2014, 59.
[4] Webber 2019, 135.
[5] Petter and Hutchinson 1989, 532.

to interpreting and enforcing the *Charter of Rights* has resulted in the judicialization of politics, a term meant to explain the transfer of policymaking power from the legislatures to the judiciary.[6]

Undeniably, right-wing critics are correct to assume that, post-1982, the Supreme Court of Canada (SCC) has played a more important policy role than ever before in the history of the institution. Virtually no constitutional scholar contests this fact. Thus far, however, the scholarship has left the impression that judicial invalidation automatically leads to fundamental policy change. Stated differently, the assumption has been that when the Supreme Court chooses to strike down legislation for its inconsistency with the *Charter*, the legislatures – save for exceptional circumstances where the notwithstanding clause (s. 33) is invoked – will have no other choice but to comply with the Court's decision.[7] It is difficult to uncritically accept such bold claims, however, given that there have been relatively few attempts to measure the policy clout and impact of the Supreme Court of Canada post-invalidation.[8] To date, the judicialization literature has focused heavily on legal mobilization efforts and the Court's remedial activism, without paying sufficient attention to the ways in which the federal and provincial legislatures can temper judicial power by introducing positive legislative sequels that "reverse, modify or avoid a judicial decision."[9]

The truth of the matter is that the judicialization of politics requires that three conditions be met: a constitutional bill of rights that entrusts courts with the power to review (and strike down) legislation; a final appellate court that is eager to participate in salient and, at times, highly controversial issues of public policy; and perhaps most importantly, a political environment that empowers the Supreme Court as a powerful policymaking institution.[10] While

[6] Hirschl 2006, 721-22.
[7] Kelly (In progress), 13 & 36.
[8] Macfarlane 2018, 395; See also Roach 2004, 52.
[9] Hogg, Bushell-Thornton and Wright 2007, 45.
[10] Hirschl 2009, 270.

right-wing scholars have convincingly demonstrated that the first two conditions are met in the Canadian context, these scholars have failed to demonstrate whether the same applies for the third condition. Essentially, it is impossible to accurately measure the policy influence of the SCC without first evaluating the legislative responses introduced by the federal and/or provincial governments – the institutions that are responsible for complying with, and enforcing, these judicial rulings.[11] By adopting court-centric approaches to the study of judicial power, scholars have unfortunately overlooked the crucial role played by legislatures in constitutional politics as the *designers* and *implementers* of public policy in response to judicial invalidation. For this reason, it is entirely possible, perhaps even likely, that the right-wing scholarship has exaggerated (or overstated) the policy influence and impact of the Supreme Court of Canada post-entrenchment of the Canadian *Charter of Rights and Freedoms*.

1.1 Research Question and Scope of Study

That being said, the thesis addresses this gap in the literature by empirically measuring the policy clout and legacy of the McLachlin Court – the first female, longest serving and, arguably, the most liberal Chief Justice to sit on Canada's highest court. From same-sex marriage and physician-assisted suicide, to safe injection facilities and reasonable trial delays, the McLachlin Court has decided critical issues of public policy. Out of a total of 94 *Charter* cases involving primary legislation reviewed by the SCC between 2000 and 2017, the McLachlin Court either invalidated (suspended or immediate) or amended 38 federal or provincial statutes (see Appendix 2). In just over 40 per cent of cases, therefore, the McLachlin Court attempted to judicialize politics through its remedial activism.

[11] Hall 2010, 15-8; See also Kelly (In progress), 5.

As a result of these 'strong-type' decisions where the Supreme Court invalidated federal and/or provincial legislation, the McLachlin Court has gained a reputation for being an extremely activist Court responsible for spearheading fundamental policy change.[12] The fact of the matter, however, is that relatively few scholars have studied the policy impact of her Court. This thesis project attempts to address this limitation by analyzing reply legislation introduced by the federal or provincial legislatures in an attempt to understand what happens after the Supreme Court invalidates legislation for its inconsistency with the *Charter of Rights and Freedoms*, or, in the case of *Chaoulli*, the Quebec *Charter of Human Rights*. In so doing, the research project provides an opportunity to challenge inaccurate assumptions about the McLachlin Court's policy impact and influence.

Utilizing dialogue theory as the framework of analysis, complemented with a modified approach to Hall's (2010) theory of courts as 'implementer-dependent' institutions, the paper asks the following research questions:

- What is the policy legacy of the McLachlin Court in key examples of judicial invalidation involving salient federal and provincial statutes?
- Have the Court's *Charter* judgments influenced the design and implementation of federal and provincial public policy responses to judicial invalidation? If so, to what extent?
- How can we measure the policy impact of judicial decisions?

The attractiveness of dialogue theory as an analytical framework stems from its attention to interinstitutional interactions or exchanges under the *Charter of Rights*.[13] The theory suggests that judicial invalidation is the beginning of a 'dialogue,' whereby legislatures respond to the Court by introducing new legislation, or re-drafting old legislation, in ways that challenge the

[12] Delacourt 2017.
[13] Hogg and Bushell 1997; Hogg, Bushell-Thornton and Wright 2007; Roach 2004.

Supreme Court's decision. In effect, dialogue theorists maintain that the legislatures can constrain judicial power via legislative noncompliance.[14] Similarly, Hall's (2010) theory of courts as 'implementer-dependent' institutions demonstrates that the Supreme Court's policymaking power (or influence) is contingent on whether the party responsible for implementing the decision complies with, and thus implements, the judicial ruling. In vertical issue areas, where lower courts implement a judicial decision, the Supreme Court habitually wields extensive power. However, in lateral issue areas, where non-judicial actors implement the Court's decision, judicial power is conditional on the likelihood that it is a decision favored/desired by the party responsible for its enforcement.[15] Taken together, these theories demonstrate that the legislatures can, through the enactment of reply legislation, mitigate the effects of judicial activism and significantly constrain the Supreme Court's policymaking power.

Finding inspiration in Hall's (2010) theory of courts as implementer-dependent institutions, the thesis project contends that the Supreme Court of Canada's (SCC) policy influence and power rests fundamentally on whether the actor responsible for implementing a judicial decision – in this case, the provincial and federal legislatures – accept, and thus implement, the Court's ruling. The thesis maintains that in cases involving lateral policy issues, the type of legislative sequel introduced in response to judicial invalidation (i.e., positive or negative) is contingent on the popularity of the judicial decision. In cases involving 'popular' judicial rulings, whereby the relevant legislature perceives the judicial decision to be a valid or viable approach to public policy, legislatures will likely enact reply legislation that complies with the Court's ruling (negative dialogic response). In these cases, the Court will be in a position to influence or dictate public policy outcomes, and will therefore behave as a powerful

[14] Hogg, Bushell-Thornton and Wright 2007, 45.
[15] Hall 2010, 15-6.

policymaking institution. In cases involving 'unpopular' judicial rulings, whereby the relevant legislature perceives the decision to be an unviable or unacceptable approach to public policy, reply legislation will likely challenge, or ineffectively implement, the Court's decision (positive dialogic response). In these cases, the Supreme Court's policymaking power will be constrained via legislative noncompliance.[16]

As the thesis project demonstrates, all six cases under review are key examples of 'strong-type' Supreme Court of Canada decisions delivered during the McLachlin era whereby the Court struck down primary legislation for unjustifiably violating the Canadian or the Quebec *Charters* (*Chaoulli*). In response to these unpopular decisions involving lateral policy areas (health, criminal justice and minority-language education), the relevant federal or provincial legislatures introduced positive dialogic sequels to address judicial invalidation. In other words, Bills 115 (in response to *Nguyen* and *Solski*), C-36 (in response to *Bedford*), C-2 (in response to *PHS Community*), 33 (in response to *Chaoulli*) and C-14 (in response to *Carter*) are, properly interpreted, examples of legislative noncompliance. As the thesis argues, this outcome is in large part explained by the fact that all six cases were unpopular with the non-judicial actors responsible for enforcing these judicial decisions. That is to say, the Court's decisions were fundamentally at odds with the policy objectives of the federal or provincial legislatures. Accordingly, the thesis demonstrates that in cases involving lateral policy areas, the extent of the Court's policy power is contingent on the legislatures' *willingness* to create conditions favorable to the judicialization of politics and judicial policymaking under the *Charter*.

Despite the McLachlin Court's best attempts to judicialize healthcare, criminal justice and minority-language education policy through its remedial activism, therefore, the policy impact of her Court was rather limited, as the relevant legislatures chose *not to* create conditions

[16] Macfarlane 2012, 44.

favorable to the judicialization of politics. Contrary to the position advanced by right-wing judicial critics, the thesis demonstrates that judicial invalidation often leaves room for an independent legislative response, even in cases where the Supreme Court issues 'strong-type' or authoritative decisions.

1.2 Methodological Approach

Essentially, by analyzing judicial-legislative policy interactions in six cases involving statutes (primary legislation) invalidated by the McLachlin Court (2000-2017),[17] the study seeks to understand how legislatures can, through the enactment of reply legislation, constrain judicial power and policymaking. These six cases include: *Chaoulli v. Québec* (2005); *Solski (Tutor of) v. Québec (Attorney General)* (2005); *Nguyen v. Québec (Education, Recreation and Sports)* (2009); *Canada (Attorney General) v. PHS Community* (2011); *Canada (Attorney General) v. Bedford* (2013); and *Carter v. Canada* (2015).

The objectives of the research flow directly from the research questions it seeks answers to, and include the following considerations:

1. Utilize dialogue theory as a framework for analyzing interinstitutional policy dynamics between the McLachlin Court (2000-2017) and the federal and provincial legislatures;

2. To use these findings as indication of the Court's capacity (or incapacity) to effectively influence public policy outcomes. In other words, to analyze the policy legacy (or failures) of the McLachlin Court; and

3. To apply a modified version of Matthew Hall's theory of courts as 'implementer-dependent' institutions in the context of the Supreme Court of Canada to measure judicial impact and contribute to theory-building initiatives in Canada.

[17] The selection criteria are explained in the "Case Selection and Data Analysis" section.

It is important here not to overstate the significance of the study's findings, particularly in relation to theory-building initiatives in Canada. The study applies dialogue theory, and a modified version of Matthew Hall's theory of the Supreme Court of Canada as an 'implementer-dependent' institution, to six cases of judicial invalidation involving controversial and salient issues of public policy. Accordingly, the study does not offer a comprehensive review of judicial power and policymaking in Canada, more generally. Nonetheless, the study provides an opportunity to revitalize the use of dialogue theory, specifically the negative/positive typology, as a useful framework for analyzing interinstitutional exchanges between the Court and the legislatures in an attempt to understand when and how legislatures respond to judicial invalidation, and what this means for judicial power and policymaking under the *Charter*.

Similarly, the study recognizes that, in Canada, the explanatory power of Hall's theory of the Supreme Court as an 'implementer-dependent' institution is limited. In effect, Hall's theory applies *exclusively* to cases involving unpopular lateral issues where the Court strikes down legislation for its inconsistency with the *Charter*. Nevertheless, Hall's theory contributes to the judicialization literature in Canada by demonstrating that, given the right set of circumstances (i.e., when the Court delivers an unpopular decision involving a lateral issue area), judicial power can be constrained via the provincial and/or federal legislatures' decision to ineffectively implement the judicial ruling.

1.3 Institutional Focus and Units of Analysis

Given the study's focus on interinstitutional policy dynamics when statutes (primary legislation) are invalidated as inconsistent with the *Charter of Rights and Freedoms*, two units of analysis were relevant: first, the Supreme Court of Canada, as this institution is the final arbiter of

constitutionality, and; second, Parliament and the provincial legislatures, as the institutions that first enact statues invalidated by the Supreme Court, and those tasked with responding with new legislation when statutes are declared inconsistent with the *Charter of Rights*.

While the SCC does not hold a monopoly over constitutional review, two reasons justify the exclusion of lower courts. First, the Supreme Court of Canada can overturn lower court decisions and have at times done so, whereas the latter *cannot* challenge the former. Second, and related, the Supreme Court is the final appellate court in Canada. Thus, the SCC speaks on behalf of *all* Canadian courts.

Moreover, the principle of federalism, and its central place in Canadian democracy, suggests that an accurate analysis of interinstitutional policy relations requires paying attention to both the federal and provincial statutes reviewed by the McLachlin Court. By focusing exclusively on judicial invalidation of provincial statutes, the study would overlook the Court's policy clout in the largest area of *Charter* review, criminal justice policy. Conversely, an exclusive focus on judicial invalidation of federal statutes would overlook the Court's influence in key areas of provincial jurisdiction, which may represent the most important and salient areas of public policy reviewed by the Supreme Court led by Beverley McLachlin, such as education and healthcare policy. In any case, the study could potentially underestimate or overestimate the Court's policy influence, in turn compromising the significance of its findings.

1.4 Case Selection and Data Analysis

Two databases were utilized to determine which Supreme Court decisions to review for the purposes of selecting significant *Charter* invalidations: CanLII and Lexum. In addition, websites such as 'openparliament' were reviewed to assess whether Parliament or the provincial

legislatures introduced legislative responses when the Court invalidated statutes as inconsistent with the *Charter*.

For the case study component of the research, the cases were purposely and strategically selected. The extensive number of *Charter*-based cases reviewed by the McLachlin Court rendered it fundamentally impossible to conduct an in-depth analysis of each decision: Out of 1290 cases (2000-2017), 239 cases, or roughly 18.5 per cent of the Court's docket, involved *Charter* rights and freedoms (see Appendix 1). Given the study's focus on the policy legacy of the McLachlin Court, however, only cases involving primary legislation were relevant. While the Supreme Court is also responsible for ensuring that the conduct of government officials (ministerial discretion, police force, judges etc.) and secondary legislation (regulations/rules) are *Charter*-compliant, primary legislation is arguably a more accurate indicator of the policy clout of the SCC given that it relates to policies that have been enacted by Parliament or a provincial legislature. As a result, the study excluded all conduct cases and secondary legislation. Reference questions were also omitted from the study given that they involve advisory opinions and do not involve a finding of statutory invalidation. Therefore, a total of ninety-four cases involved primary legislation, or statutes, during the McLachlin era (see Appendix 2).

Additionally, the use of dialogue as the framework of analysis implies that all cases where the Court determined that legislation did not infringe on rights, or was a justifiable infringement, must also be excluded. This is because dialogue theory requires a legislative response to a previous finding of unconstitutionality to occur, which involves the Supreme Court exercising its remedial powers under section 24(1) of the *Charter of Rights*. This produces a subset of cases that involve thirty-eight examples of remedial activism (see Appendix 3).

From this list, an additional nineteen cases were excluded, as the responsible legislature either repealed the offending provision, or did not introduce a legislative response to address judicial invalidation. According to Manfredi and Kelly (1999), these are examples of 'negative responses' that cannot be considered examples of *Charter* dialogue theory in practice.[18] Further, Hall's theory can only be tested in cases where the legislature responded to judicial declarations of unconstitutionality, as this requires a legislative response on the part of the responsible political actor to test the Supreme Court as an 'implementer-dependent' institution. In effect, only in cases where the legislature introduces legislation in response to a judicial finding of unconstitutionality can this research project test the policy impact of judicial review.

These criteria, therefore, reduce the number of cases where the conditions exist to evaluate the Supreme Court as an 'implementer-dependent' institution to nineteen cases. From this list, and given the parameters of a Master's thesis, six judicial decisions were selected to conduct a case study of judicial policymaking, and its impact, during the McLachlin years: *Chaoulli v. Québec* (2005); *Solski (Tutor of) v. Québec (Attorney General)* (2005); *Nguyen v. Québec (Education, Recreation and Sports)* (2009); *Canada (Attorney General) v. PHS Community* (2011); *Canada (Attorney General) v. Bedford* (2013); and *Carter v. Canada* (2015). These cases were selected for the following three reasons:

1. they address key areas of public policy, such as criminal justice (*PHS Community* and *Bedford*), language (*Solski and Nguyen*) and health policy (*Chaoulli* and *Carter*). In this respect, they represent the core responsibilities of the two orders of government;

2. they represent landmark SCC decisions delivered during the McLachlin era, and;

[18] Manfredi and Kelly 1999, 520-22.

3. they address politically, culturally, and socially salient and controversial issues of public policy, involving minority language education rights in Quebec, medical assistance in dying, prostitution reform, private health insurance, and safe injection facilities.

Additionally, all of the cases, with the exception of *Chaoulli*, are unanimous decisions; two of these cases, *Carter* and *Solski*, were judgments authored by 'The Court.' Unanimous decisions are particularly interesting because they are generally perceived as 'strong' or 'authoritative' judgments and, as a result, are less likely to witness a legislative response. Therefore, in speaking with one voice, the Court creates conditions favorable to judicial policymaking. Dissenting opinions, by contrast, lack the same degree of authority, and split decisions (especially when it is a narrow majority) create conditions favorable to the introduction of independent legislative responses because they are marked by "legal uncertainty."[19] The expectation of this study, therefore, is that dissenting opinions are more likely to see a legislative response, whereas unanimous decisions are less likely. In regard to the cases chosen for analysis, five involved unanimous decisions that witnessed legislative responses, making them particularly interesting cases to study because of this paradoxical outcome.

It is also important to note that the *Chaoulli* decision is an outlier in two important respects: first, it is a split decision (4:3); and second, a very narrow majority found that the impugned provisions violated the *Quebec Charter of Human Rights*, but were split evenly on the issue of whether the provisions infringed the Canadian *Charter of Rights and Freedoms*. Nonetheless, its inclusion is justified on a number of grounds. First, *Chaoulli* is one of the rare cases to deal with healthcare policy – a core area, and perhaps the most important area, of provincial jurisdiction. The fact that billions of dollars annually are injected into the healthcare system demonstrates the importance of health policy to provincial governments and, to a lesser

[19] McCormick 2005, 5; Macfarlane 2010, 401; Mathen 2003, 325 & 327.

degree, the federal government.[20] Second, the quasi-constitutional status of the *Quebec Charter of Human Rights*, when compared to other provincial human rights codes, justifies its inclusion. In fact, the *Quebec Charter* applies to both private and public law and, in this respect, functions as a quasi-constitutional document.[21] As a result, the Quebec government is more likely to take legislative action than its provincial counterparts in cases where the Court declares legislation to be incompatible with a human rights code, such as the *Quebec Charter*. The fact that *Chaoulli* was followed by a legislative response attests to this claim.

PHS Community is also an exceptional case in that the SCC ruled on the unconstitutional application of ministerial discretion, and did not centre on the constitutionality of the statute that authorized ministerial discretion. Nonetheless, the Minister's power to issue exemptions for safe injection facilities under the *Controlled Drugs and Substances Act* (*CDSA*) stems from the statute itself. While the Court's decision did not challenge the constitutionality of the legislation, it did implicitly challenge the statute by questioning the use of ministerial authority under the *CDSA*. The fact that the federal government responded to the Supreme Court's decision by introducing new legislation with respect to exceptions under the *CDSA* suggests, at least to some degree, that the Harper Conservatives interpreted the decision not only as an attempt to overrule the Minister of Health's decision, but also as an implicit 'attack' on government legislation.

1.5 Measuring and Operationalizing Judicial Policy Impact

To reiterate, the study seeks to analyze the policy legacy of the McLachlin Court by employing dialogue theory as the framework of analysis, complemented with a modified approach of Supreme Courts as 'implementer-dependent' institutions. This required looking at the Court's

[20] Manfredi and Maioni 2002, 221; Gilmour 2006, 329.
[21] Bateman 2006, 321; Manfredi and Maioni 2006, 264.

remedial activism and the substance/content of their decision – namely the policy prescriptions and directives provided by the Court via their judgment, particularly section 24(1) of the *Charter*. It also entailed reviewing legislation introduced in response to statutory invalidation to determine whether reply legislation qualified as negative or positive dialogue.[22] Finally, the study cross-compared the data in an attempt to measure the Court's policy impact i.e., their capacity to influence public policy post-constitutional review.

Court decisions fall into one of four categories: the Court invalidates legislation; suspends a declaration of unconstitutionality; amends legislation; and finally, determines that legislation is *Charter* compliant (upheld). Invalidation refers to situations where the Court strikes down legislation, whereas suspended invalidation refers to situations where the Court declares that a statute is incompatible with the *Charter* but provides the legislatures with a certain amount of time to remedy the defects. Three situations count as judicial amendment. The Supreme Court either reads-in provisions (they add sections to the statute), reads-down (they remove sections), or severs statutes (they remove/add words or sentences).[23]

Legislative responses fall into one of four categories: (1) no legislative response; (2) the invalidated legislation is repealed and never replaced; (3) the invalidated legislation is repealed and replaced; and (4) the invalidated legislation is amended. Categories 1 and 2 are coded as examples of negative dialogue because the legislature made no attempt to challenge the Court's decision. By failing to respond to Court declarations of unconstitutionality, the legislatures allow the Court, by default, to influence public policy outcomes and thus to act as policymakers.[24] Classifying responses that fall into categories 3 and 4 requires analyzing legislative responses to determine whether new legislation accomplishes the same policy objectives as its predecessor

[22] Manfredi and Kelly 1999, 520-22.
[23] Macfarlane 2012, 49.
[24] Macfarlane 2012, 44.

(positive dialogue), or whether it compromises/abandons its initial objectives (negative dialogue).[25] The fifty per cent mark can be used as a point of reference for measuring the policy influence of the McLachlin Court. The higher the number of positive responses, the less influence the Court exercises over public policy outcomes. Conversely, the lower the number of positive responses, the greater policy influence the Court exercises.

Finally, Hall's (2010) theory of the Court as an implementer-dependent institution claims that in lateral issue areas, implementation by non-judicial actors depends heavily on the *popularity* of the Court's decision.[26] The present research develops a proxy for distinguishing between popular/unpopular issues: campaign platforms of incumbent governments, as this "helps to identify the importance of a policy issue to the government of the day."[27] This is important given that, in a substantial number of *Charter* cases, the legislature tasked with responding to judicial decisions is not the government responsible for its original enactment. The expectation of this study is that the legislatures are more likely to make room on a crowded agenda, and thus respond to judicial invalidation or amendment by introducing positive legislative sequels, when the issue at stake is important to their party. Party platforms are arguably a more accurate proxy for measuring the 'popularity' of judicial decisions in the Canadian context when compared to public opinion polls, as Hall's study centred on judicial power in the American Congressional system.

1.6 Outline of Chapters

Excluding the present chapter, the thesis is structured into five chapters. The second chapter includes a comprehensive literature review that draws on four bodies of literature: the left-wing

[25] Manfredi and Kelly 1999, 521-22.
[26] Hall 2010, 18; See also Kelly 2018, 251.
[27] Macfarlane 2018, 409.

position, dialogue theory, the judicialization and the judicial policymaking literatures in Canada. It highlights some of the limitations of existing work and the ways in which the present research seeks to overcome these limitations. With respect to Hall's theory, it draws on institutional differences between Canada and the United States in an attempt to demonstrate that Hall's framework must first be reformulated to ensure its applicability to a parliamentary system of government.

Chapters three through five are dedicated to the case study component of the research. Each chapter focuses on a specific policy issue. Chapter three addresses criminal justice policy (*PHS Community* and *Bedford*), chapter four reviews health policy (*Chaoulli* and *Carter*) and chapter five explores minority-language education policy in Quebec (*Solski* and *Nguyen*). Each chapter provides an overview and summary of the cases – including the policy issue at stake, the litigants involved, and also draws on important historical, political and/or social facts relevant to the case. Additionally, each chapter outlines the facts and outcome of the cases, applies dialogue as a framework for analyzing the substance of legislative responses to judicial invalidation, and interprets what these findings reveal about judicialization in Canada and the policy clout of the McLachlin Court.

Here it is important to recall that three factors contribute to the judicialization of politics: "a constitutional framework that promotes the judicialization of politics; a relatively autonomous judiciary that is easily enticed to dive into deep political waters; and above all, a political environment that is conductive to the judicialization of politics."[28] The inclusion of a strong remedial provision in the *Charter* (s. 24(1)), combined with the Court's 'activist' approach to judicial review, suggests that the first two conditions are met in Canada. Indeed, and as previously suggested, a review of the McLachlin Court's *Charter* docket (primary legislation)

[28] Hirschl 2009, 270.

demonstrates that they have, generally speaking, been a particularly activist Court. For example, roughly two in five cases involving federal or provincial statutes witnessed the McLachlin Court strike down legislation for its inconsistency with the Canadian *Charter of Rights and Freedoms*. If one considers the legal outcome of these cases alone, therefore, it appears that the McLachlin Court successfully judicialized politics during its time in power.[29]

Right-wing critics have thus far failed to demonstrate, however, whether the 'political environment' creates conditions hospitable (or hostile) to judicialization. In other words, they have failed to evaluate the impact of these legal decisions, or, put differently, they have failed to "understand what happens after a statue is declared unconstitutional by the Supreme Court of Canada."[30] In applying Hall's theory of Courts as 'implementer-dependent' institutions, the present paper seeks to fill this gap by demonstrating that judicialization depends on which actor is responsible for implementing the Court's decision (judicial or non-judicial) and, in the case of lateral issues, whether the decision is *popular*.[31]

The final chapter is the conclusion. It summarizes key findings, paying specific attention to Hall's (2010) theory of Court's as 'implementer-dependent' institutions and its relevance to the study of the Supreme Court of Canada's power and policy impact. It also highlights the significance and implications of the research, including its contributions to the judicialization of politics literature in Canada. Further, the conclusion draws on the limitations of the research project and promising areas for future research.

[29] See Appendix 2
[30] Kelly (In progress), 5.
[31] Hall 2010, 18.

2

The Judicialization of Politics and Judicial Policymaking in Canada

The present chapter surveys four bodies of literature relevant to the study of judicial power and the Supreme Court of Canada's policy impact post-entrenchment of the Canadian *Charter of Rights and Freedoms*. Accordingly, the chapter is divided into four sections: the left-wing critical position, the judicialization of politics and the right-wing critical position, dialogue theory, and the judicial policymaking literature, with a specific focus on Hall's (2010) theory of courts as 'implementer-dependent' institutions. In so doing, it addresses a series of normative and empirical debates concerning judicial activism and the legitimacy of judicial review in Canada post-1982.

This review seeks to demonstrate that, in spite of its contributions, existing literature on judicial policymaking power in Canada is limited for a number of reasons. For starters, the arguments advanced by left-wing critics are unsatisfactory insofar as they are based heavily (if not entirely) on scholars' subjective opinions about the 'best-suited' approach to rights protection in Canada. In this respect, it offers little to the study of judicial power and the Supreme Court's policy clout.

With respect to the right-wing critical position, a debatable narrative has developed which depicts the Court as an 'all-powerful' and 'policy-hungry' institution.[1] These claims, however, remain largely speculative given that there have been relatively few attempts to *empirically measure* judicial power and the Court's policy impact.[2] A more serious flaw,

[1] Monahan 2001, 387; Kelly 2005, 35; Morton 1992, 627; Morton and Knopff 2000, 22.
[2] Macfarlane 2018, 395; See also Roach 2004, 52.

however, is the fact that right-wing scholars have generally adopted court-centric approaches to the study of judicial power, which focus heavily on judicial activism and legal mobilization efforts. Undeniably, conservative critics have contributed to the judicialization literature by demonstrating that the Court plays an important policy role as 'agenda-setters' given their capacity, and, at times, willingness, to invalidate legislation for its inconsistency with the *Charter*. Right-wing judicial critics have mistakenly assumed, however, that judicial invalidation automatically translates into, or results in, fundamental policy change.[3] The question remains, does judicial invalidation actually lead to policy change?

Arguably, dialogue theory and Hall's (2010) theory of courts as 'implementer-dependent' institutions provide a useful means for addressing these gaps in the existing literature. As dialogue theorists rightfully suggest, the legislatures can introduce an independent legislative response to address judicial invalidation in ways that challenge the Court's decision and, as a result, can temper the effects of judicial activism.[4] Similarly, Hall's (2010) theory of final appellate courts as 'implementer-dependent' institutions demonstrates that the Supreme Court of Canada's policy power and influence is contingent on whether the actor responsible for implementing a judicial decision accepts, and thus complies with, the decision. In cases where non-judicial actors implement judicial rulings (lateral issue areas) – for example, the federal and provincial legislatures – the Court's power is conditional on the likelihood that it is a decision favored/desired by the party responsible for its enforcement.[5] While Hall's theory requires modifications before it can be applied in the Canadian context, it nonetheless serves as a useful way of understanding the *conditions* under which the Supreme Court of Canada behaves as a powerful policymaking institution.

[3] Kelly (In progress), 13
[4] Hogg, Bushell-Thornton and Wright 2007, 45.
[5] Hall 2010, 15-8.

In short, this review seeks to demonstrate that right-wing judicial critics have mistakenly downplayed the key role played by the federal and provincial legislatures in constitutional politics as the *designers* and *implementers* of public policy in response to judicial invalidation. As a result, conservative critics have potentially exaggerated the extent of the Supreme Court of Canada's policy influence and impact post-1982.

2.1 Left-Wing Charter Critics

Two critical positions emerged in response to the *Charter*: left- and right-wing critics. On the one hand, left-wing critics, such as Fudge, Hutchinson and Petter, are critical of the *Charter* as a document. Conversely, Manfredi, Morton and Knopff, dubbed right-wing judicial critics or conservative critics, are critical of the Court's activist approach to constitutional review.

For left-wing scholars, the *Charter* has failed to fulfill its promise of being a 'transformative document' capable of addressing and resolving structural discrimination and inequality.[6] Two reasons explain this outcome. The first stems from the type of rights and freedoms guaranteed by the *Charter*, while the other stems from the nature of the institution charged with its interpretation and enforcement.[7]

Left-wing scholars claim that the *Charter* has adopted a negative and, ultimately, restrictive approach to protecting rights and liberties.[8] In excluding social and economic rights, these scholars contend that the *Charter* serves as an ineffective tool for combatting persisting disparities in wealth and power in Canada.[9] Rather, the *Charter* has served as a "potent political weapon" utilized almost exclusively by powerful corporations and other powerful interest groups

[6] Fudge and Glasbeek 1992, 52; Hutchinson and Petter 1988, 283.
[7] Petter 1989, 152.
[8] Fudge and Glasbeek 1992, 52; Hutchinson and Petter 1988, 283.
[9] Petter 1989, 152-53.

to advance their policy interests.[10] The costs of *Charter* litigation have in turn served to deter the underprivileged and marginalized – those who would benefit from a progressive rights document – from using the courts to advance their policy interests, effectively denying them the same privilege it has granted powerful groups.[11]

According to the left-wing position, the *Charter*'s progressive potential is thwarted because it applies exclusively to the public sphere and thus does not apply to the private sphere, the place where rights injustices frequently occur. More worrisome is the fact that the *Charter* grants the courts – an elitist institution composed largely of affluent, white, middle-aged, and male justices – unfettered discretion in making the public/private distinction. The privileged status of courts implies that they will be more sympathetic to the concerns and interests of business elites than those of the disadvantaged and marginalized.[12] In ruling that powerful corporations fall outside of the meaning of 'public,' Canadian courts not only immunize certain groups from being accountable to the *Charter*, they also permit corporations to "mobilize the *Charter* as a weapon to resist government regulation and to insulate [themselves] from popular scrutiny and control."[13]

While left-wing scholars raise a number of issues associated with the *Charter*, their arguments are wholly unconvincing. For left-wing scholars, the assumption is that because Canadian courts are elitist and unrepresentative, the courtroom is a venue unsuitable for addressing the interests of the economically and socially disadvantaged. Interestingly enough, this critique of the Court was made at a time when the composition of both Houses of Parliament, the institutions left-wing scholars suggest are better equipped to serve such interests,

[10] Hutchinson and Petter 1988, 279.
[11] Fudge and Glasbeek 1992, 52; Hutchinson and Petter 1988, 283; Petter 2009, 39; Petter 1989, 155.
[12] Petter 1989, 157.
[13] Hutchinson and Petter 1988, 284.

were demographically similar to that of courts; politicians tended to be wealthy and powerful men, and, in this respect, could have also been said to be unrepresentative of Canadians and unresponsive to the interests of the underprivileged.[14] In more recent years, this argument may be even less compelling given that the Supreme Court of Canada is, overall, a relatively gender-balanced institution.

Moreover, left-wing scholars claim that the *Charter* promotes a regressive, formal and classical-liberal approach to protecting rights and liberties.[15] Thus, the undemocratic critique is based heavily on the fact that the document is inconsistent with their preferred version of a 'social-democratic' *Charter*. A central limitation associated with the left-wing position, therefore, is that it "is more an attack on liberal democracy than it is an analysis of Charter review by the Supreme Court."[16] Here it is important to recall that the central objective of the present research is to gain a better understanding of the policymaking power of the Supreme Court under McLachlin's leadership. Therefore, the arguments and concerns raised by right-wing critics, specifically those related to judicial activism and the judicialization of politics, are better suited for addressing the study's objectives.

2.2 Right-Wing/Conservative Judicial Critics

Constitutional scholars agree that, post-1982, the courts have played a more important policy role than every before in the history of the institution.[17] This phenomenon, one that is also making wave in other countries with constitutionalized bills of rights, is now commonly referred to as the 'judicialization of politics,' which is meant to explain "the ever-accelerating reliance on

[14] Sigurdson 1993, 142-43.
[15] Petter 1989, 152 & 156; Hutchinson 1990, 6.
[16] Kelly 2005, 26 & 32.
[17] Russell 1994, 165-66; Hirschl 2008, 93; Morton 1987, 32; Dodek 2009, 94; Kelly and Manfredi 2009, 4; Russell 1995, 137.

courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies." [18] In Canada, the 'judicialization debate' stems from competing understandings of the degree or extent of judicialization in Canada, and secondly, from conflicting understandings of the democratic implications of judicial review. Two groups have actively participated in these ongoing debates: right-wing judicial (or conservative) critics and dialogue theorists.

From the onset, conservative critics worried that the Supreme Court's capacity to exert significant policy influence in areas falling within the scope of the *Charter* would result in 'judicial supremacy,' an outcome that would have debilitating effects on the legitimate functioning of Canadian democracy. For these scholars, it is the Supreme Court's activist approach to the *Charter*, rather than the *Charter* in and of itself, that is the root cause of judicialization.[19] According to conservative critics, the Court has:

- embraced an 'open-door policy' for interveners,[20] allowing powerful interest groups to use the courts as a venue for advancing their policy interests;[21]
- adopted "one of the most liberalized standing regimes in the world";[22]
- gained near complete discretion over its docket and thus controls the number (and nature) of rights-based issues that it hears;[23]
- applied a liberal or 'living-tree' approach to constitutional review, thus allowing the Court to establish the boundaries of the *Charter* by shaping its meaning and application through its judgments;[24]

[18] Hirschl 2006, 721-22.
[19] Morton and Knopff 2000, 40 & 57; Vaughan 2001, 16.
[20] Morton and Knopff 2000, 55
[21] Mintz, Tossutti and Dunn 2014, 352; Webber 2019, 156; Huscroft 2009, 53; Morton and Knopff 2000, 26.
[22] Huscroft 2009, 53; See also Manfredi 2014, 147.
[23] Manfredi and Maioni 2002, 216-17.
[24] Morton, Solomon, McNish and Poulton 1989, 408; Morton 1992, 629; Hogg 1987, 97; Morton and Knopff 2000, 15; Manfredi 2014, 147.

- used the reasonable limits clause (section 1) of the *Charter*, or the *Oakes* test – a judicially created and enforced tool – to determine whether rights infringements are justified, therefore choosing "how to balance competing interests or purposes,"[25]; and
- behaved as a policy influencer and shaper through its remedial activism.[26]

Right-wing critics contend that the judicialization of politics, or judicial activism, is incompatible with the legitimate functioning of a constitutional democracy: the Supreme Court is an unelected, unaccountable and elitist institution that has stripped the legislatures of their policymaking power.[27]

Initially, participants in the 'judicialization of politics' debate in Canada focused on the method of judicial review that was necessary to ensure that the Supreme Court of Canada's approach to the *Charter of Rights and Freedoms* was consistent with the role of courts in a constitutional democracy.[28] Generally speaking, this theoretical justification centred on the interpretivist/non-interpretivist approaches.

The distinction between 'interpretivism' and 'non-interpretivism' stems from the interpretive flexibility scholars are willing to grant the courts. Sometimes labelled as the 'frozen-rights' or 'originalist' approach, interpretivism is the idea that courts should interpret and apply the *Charter* in ways that adhere to the original meaning or understanding as intended by its framers.[29] On the other hand, 'non-interpretivism,' sometimes called the 'living tree' or 'non-originalist' approach, suggests that courts should actively update the meaning of the *Charter* via judicial review in an attempt to allow for the possibility of constitutional growth and evolution.[30]

[25] Tushnet 2003, 94.
[26] Kelly and Manfredi 2009, 10.
[27] Vallinder 1994, 91; Hirschl 2000, 92 & 94.
[28] Hogg 1987, 95.
[29] Hogg 1987, 91; Kelly 2014, 100; Kelly 2005, 34.
[30] Jackson 2006, 954.

Whereas interpretivism seeks to minimize judicial discretion in interpreting and applying the *Charter*, non-interpretivism seeks to maximize it.[31]

The crux of right-wing critics' argument is that in deviating from the language or wording of the *Charter*, the Court transforms into an institution responsible not for enforcing laws, but rather, one that creates laws.[32] The 'undemocratic' critique, therefore, is premised on the fact that in adopting a 'non-interpretivist' approach to constitutional review, and in encouraging an expansive understanding and application of rights and freedoms, the Court increases the number of policy issues that fall within the scope of the *Charter*'s protection.[33] By extension, it creates an environment where virtually all government statutes are susceptible to judicial review, and thus judicial nullification.[34]

Importantly, theories of interpretivism/non-interpretivism were first introduced in the United States.[35] While this approach to understanding the judicialization of politics is relevant to the study of judicial power in the United States, where these approaches were developed and continue to dominate academic discussion, they may be less relevant when applied in the Canadian context. In placing too great of emphasis on the provincial premiers as key drafters, right-wing critics have "diluted the significance of more important figures – such as Trudeau, officials within the Department of Justice, [interest groups], and the [Special Joint Committee] (SJC)."[36] Given their concern with the *Charter*'s centralizing effect, especially when considering that the Supreme Court is composed of federally appointed justices, it is evident that the premiers

[31] Morton and Knopff 2000, 45.
[32] Kelly 2005, 33-4; Hirschl 2002, 214; Morton and Knopff 2000, 28; Oliphant 2015, 242; Harrington 2012, 184; Morton 1992, 629.
[33] Morton 1992, 629.
[34] Hogg 1987, 91; Morton 1987, 34.
[35] Hogg 1987, 91.
[36] Kelly 2005, 86.

favored a *Charter* that would limit judicial power.[37] Indeed, most premiers outright opposed the idea of a constitutional bill of rights, preferring instead to engage in constitutional negotiations that would address the limitations of the current approach to federalism and the division of powers. In particular, the premiers worried that the *Charter* – which, unlike the *Bill of Rights*, would apply to both provincial and federal governments – would undermine their policymaking autonomy and would serve as "a direct assault on the principle of *legislative supremacy*."[38] In fact, the inclusion of section 33 (the notwithstanding clause), which had not been originally considered by the Trudeau liberals in the original draft of the *Charter*, was inserted to appease provincial concerns and to avoid a constitutional stalemate.[39]

If one takes the view that the premiers were the sole (or even primary) drafters, therefore, it appears that an activist Court operates contrary to framers intent. Once one factors in the various other 'drafters,' however, the argument loses its value. Arguably, the Trudeau Liberals welcomed judicial activism and, importantly, advocated for a 'living tree' approach to judicial review.[40] As Kelly (2005) convincingly argues, the inclusion of a strong remedial provision (s. 24(1)) in the final draft of the *Charter* – a provision nonexistent in the *Charter*'s predecessor, the *Bill of Rights* – supports this claim; its inclusion was a deliberate choice made by the drafters to strengthen the role of courts in constitutional politics.[41]

A review of the debates surrounding the *Charter*, specifically the arguments advanced by groups appearing before the SJC, also suggests that, overall, the public supported a strong *Charter* that would empower the courts as 'guardians' of rights and freedoms.[42] With respect to section 1 (the reasonable limits clause), for example, the premiers favored a provision that would

[37] Hirschl 2002, 212; Bayefsky 1987, 812; See also Sigurdson 1993, 120.
[38] Hiebert 1990, 107; See also Fraser 2003, 19-20.
[39] Anand 2006, 94.
[40] Kelly 2005, 12, 80 & 91.
[41] Kelly 2005, 85.
[42] Hiebert 1990, 126.

maximize provincial and federal discretion in limiting rights and freedoms. However, groups that appeared before the SJC preferred a provision that would limit the potential for government to justify infringements on protected rights.[43] In short, the provincial premiers appear to be the *only* framers who sought to limit judicial power and activism under the *Charter*.

The fluid and broad wording of the *Charter* is perhaps further indication of the framers' intention to draft the *Charter* in ways that would allow the Court to adapt its meaning to changing political, social and cultural landscapes. In effect, there is no evidence, at least no strong evidence, to support right-wing critics' claim that "the framers had clear views about the [precise] meaning of the words they were adopting and intended that these meanings should be forever conclusive."[44] A number of public statements made by Jean Chrétien, who at that time of the negotiations served as Trudeau's Minister of Justice, support this claim. As Fraser (2003) demonstrates, Chrétien repeatedly asserted that the *Charter* was intentionally drafted in such a broad and fluid manner so as to allow for the possibility of constitutional growth via judicial review.[45] Paradoxically, right-wing criticisms of the Court, and on the undemocratic nature of judicial review, rest largely on the assumption that the framers intended the Court to adopt a 'frozen-rights' approach.

Contrary to the United States, therefore, the utility of the 'interpretivist' model, and its use as a framework for understanding and measuring judicial power, is not as convincing when applied to Canada. This is in part explained by the fact that right-wing critics have exaggerated the importance of the premiers as key players in the debates, and in part explained by the fact that they have misunderstood the intentions of the remaining drafters who, as the proceeding analysis demonstrates, welcomed judicial activism.

[43] Hiebert 1990, 122.
[44] Hogg 1987, 96.
[45] Fraser 2003, 19-20.

Conservative skeptics have also been criticized for their tendency to exaggerate the extent of judicialization in Canada by overlooking a number of constraints that limit judicial policymaking. These constraints flow from the *types* of rights and freedoms guaranteed by the *Charter*, as well as the Court's *approach* to the *Charter*.[46]

The first constraint arises from the fact that the *Charter* is framed in terms of negative rights and freedoms.[47] With the exception of section 23 (the official minority language provision), therefore, the *Charter of Rights* does not impose positive obligations on the state to take policy action.[48] In effect, the positive/negative rights distinction is an important one to make given that it has very different implications for judicial policymaking and power. As Macfarlane (2012) suggests, a 'negative' approach requires that government abstain from interfering with protected rights and freedoms, whereas a 'positive' approach requires government to "deliver or ensure access to the rights in question." Thus, a positive rights approach is more troubling from a democratic standpoint because it allows the Court – by providing "entitlement[s] to … new benefit[s]," and thus placing financial obligations on government to deliver services – to act as policymakers.[49]

In spite of the fact that the *Charter* is a 'negative' rights document, there is some evidence that suggests that the Supreme Court has interpreted and applied the *Charter*, particularly section 7, or 'legal rights,' in ways that transform negative rights into positive entitlements. This was the case in *Carter v. Canada*, where the Court required that the legislatures establish programs for medical assistance in dying;[50] in *Vriend v. Alberta*, a case

[46] Russell 1995, 141.
[47] Russell 1995, 141.
[48] Macfarlane 2014, 51.
[49] Macfarlane 2014, 50 & 53.
[50] Macfarlane 2016, 121; Macfarlane 2018, 397; Chan and Somerville 2016, 158.

involving sexual orientation;[51] and in *Eldrige*, a case involving government funding for translation for the hearing impaired.[52] While the Court has at times imposed positive obligations on government, these cases tend to be exceptions. For example, in *Egan* (old age pension plans) and in *Adler* (funding for Jewish schools), the Court did not require that the legislatures use public funding in ways that would extend protection to litigants. Similarly, while *Vriend* required that the legislature extend equality protections to include sexual orientation, the decision did "not place a substantive obligation on the state to address discrimination."[53] In short, cases involving positive rights represent *a minority* of successful *Charter* challenges heard by the Supreme Court (for example, just under 40 per cent between 1982 and 1999), suggesting that the Court infrequently imposes positive obligations on government to protect rights.[54]

Additionally, while the *Charter* guarantees a number of rights and freedoms, other rights, such as health, economic and property rights, are excluded.[55] This suggests that while criminal policy is heavily judicialized, other key policy areas are immune from the *Charter*, thus rendering them 'non-judicializable.'[56] The problem, however, is that the Supreme Court's reasoning, and the ways in which it exercises its remedial powers under the *Charter of Rights*, might mean that in non-criminal cases, the Court plays a more direct role in the policymaking process despite the fact that such cases occupy a relatively small percentage of the Court's *Charter* docket. Nonetheless, and as Kelly (2014) demonstrates, the Court has adopted a rather restrained approach to constitutional review in non-legal rights cases: in approximately 75.1 per cent of these cases, the Supreme Court ruled in favor of government. Further, in a majority of 'activist' *Charter* challenges where the Supreme Court ruled in favor of litigants, the issue at

[51] Zanoni 2018, 74.
[52] Flood and Xavier 2008, 634; Macfarlane 2014, 53
[53] Kelly 2005, 36-7.
[54] Kelly 2014, 104.
[55] Macfarlane 2014, 51.
[56] Russell 1995, 141; Kelly 2014, 101.

stake involved the constitutional obligations of the police and abuses of power. From a democratic standpoint, activist decisions involving police conduct are less troubling because they typically involve negative rights, and because they are often concerned with criminal policy and/or involve legal rights issues – a policy area for which the courts are often assumed to be experts. On the flip side, judicial invalidation of statutes is worrisome because it has the potential to threaten the policy autonomy of legislatures, and because it creates an opportunity for the Supreme Court, an unaccountable and unelected institution, to dictate policy outcomes.[57]

Taken collectively, these studies demonstrate that judicialization is not as robust as contended by right-wing scholars because the *Charter* largely protects negative freedoms, and does not compel a public policy response via positive rights obligations. Indeed, positive rights are generally absent from the *Charter of Rights and Freedoms*, save for the minority language education rights protection in section 23. Moreover, these scholars demonstrate that conservative critics' fears may be misplaced in regard to public policy obligations placed on Parliament and the provincial legislatures as a result of judicial participation in policy debates via the *Charter*.

2.3 Dialogue Theory and the Supreme Court of Canada

Dialogue theorists, such as Hogg, Bushell and Roach, have similarly challenged conservative critics' claim that judicial review is undemocratic.[58] For these scholars, judicial invalidation is the beginning of a 'dialogue,' or inter-institutional conversation, between the Court and the legislatures.[59] More specifically, they contend that there are two dialogic instruments capable of constraining judicial power: section 33 (the notwithstanding clause) and section 1 (the reasonable

[57] Kelly 2014, 101, 103, 111 & 120.
[58] Huscroft 2009, 50.
[59] Mintz, Tossutti and Dunn 2014, 49; Hogg and Thornton 2001, 107; Hogg, Bushell-Thornton and Wright 2007, 26; Hogg and Bushell 1997, 79-80.

limits provision).[60] Section 33 grants Parliament or provincial legislatures the opportunity to override court decisions for a renewable five-year period if certain conditions are met,[61] while section 1 allows government to justify limitations on protected rights and freedoms in cases where the infringement is 'demonstrably justified in a free and democratic society.'[62]

Dialogue theorists' assertions, however, fail to alleviate the concerns raised by right-wing critics regarding the political role of the Court in fundamental policy debates. Scholars often cite the limited use of section 33, and the fact that it has only been successfully invoked once in over thirty years, as evidence of the dialogic incapacity of the provision.[63] Even if Canada were to one day witness the revival of section 33, its dialogic capacity would nonetheless be limited. This is because section 33 does not apply to *all* rights and freedoms protected under the *Charter*; it applies exclusively to sections 2 and 7-15. Certain core provisions, such as democratic and language rights, are exempt from the legislative override, thus rendering the notwithstanding clause a viable means of curbing judicial activism in only a select number of cases.[64]

Similarly, while section 1 allows governments to justify limits as reasonable in a free and democratic society, there is no guarantee that the Court will be receptive to such a defense.[65] As Hiebert (2004) argues, the courts apply the *Oakes* test – a judicially created and enforced tool – to determine whether rights infringements are demonstrably justified. In utilizing this two-stage test, courts first determine whether the legislature's policy objective is 'pressing and substantial.' If it passes the first part, they then determine whether legislation is rational, proportional and importantly, whether it minimally impairs on rights. In effect, the multi-tiered and vigorous approach adopted by the Supreme Court, coupled with the fact that it provides the courts wide

[60] Roach 2001(a), 7; Roach 2001(b), 483; Hogg and Bushell 1997, 82.
[61] Hogg, Bushell-Thornton and Wright 2007, 3.
[62] Hogg and Thornton 2001, 108; Vaughan 2001, 14.
[63] Tushnet 2011, 330; Goldsworthy 2003, 466; Leclair 2004, 552.
[64] Huscroft 2009, 55; Vaughan 2001, 14.
[65] Hiebert 2004, 1973; Leclair 2004, 551.

latitude in determining whether rights infringements are justified, renders it relatively difficult for legislatures to succeed in section 1 defenses.[66] In the context of section 7 (the right to 'life, liberty and security of the person'), for example, the Supreme Court has never, in over thirty-five years, determined that legislation constituted a justifiable infringement on rights.[67]

Studies on the ineffectiveness of section 1 and 33 have led scholars to assert that Canada functions as a strong-form system. First introduced by Mark Tushnet, the strong/weak typology became a popular method for distinguishing between different systems of judicial review.[68] In strong-form systems, the remedial powers of courts include the ability to invalidate and/or amend legislation.[69] Further, Court decisions are 'authoritative' given that such rulings can only be overturned in one of two ways, both of which are highly unlikely: the Court can reverse its previous decision, or the legislature(s) can amend the constitution. Conversely, weak-form systems are characterized by limited remedial powers of courts (statements of incompatibility) and a formal override provision.[70]

Court decisions in both strong- and weak-form systems can be overturned; the key difference is the time frame of reversal. In weak-form systems, court decisions can be overturned in the short-term because mechanisms of reversal are easier to deploy, and because judicial review is non-binding on government. In strong-form systems, judicial decisions tend to endure in the long-term because mechanisms of reversal are more difficult to deploy, and because judicial review is binding on government.[71]

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[66] Hiebert 2004, 1973.
[67] Stewart 2015, 579.
[68] Kavanagh 2015, 1009.
[69] Knopff, Evans, Baker and Snow 2017, 619; Tushnet 2011, 323.
[70] Knopff et al. 2017, 612; Sinnott-Armstrong 2003, 381.
[70] Tushnet 2002, 2785-86; Dixon 2012, 488.
[71] Kavanagh 2015, 1012-113; Tushnet 2002, 2784.

In Canada, the Supreme Court's strong remedial powers, coupled with the ineffectiveness of sections 1 and 33 as dialogic instruments, suggests that it operates as a strong-form system. And yet this claim seems to be at odds with Tushnet's (2003) assertion that Canada operates as weak-form,[72] a claim that does not stand up to scrutiny once all the evidence is considered. Indeed, the weak/strong-form distinction "begins to lose some of its purchase" when one considers the clear disjuncture between judicial review systems in theory (Canada as weak-form), and in practice (Canada as strong-form).[73] In focusing exclusively on constitutional design, the strong-/weak-form typology assumes that systems of judicial review are fixed or static. The Canadian case demonstrates, however, that weak-form systems can indeed transition into strong-form, and vice versa. More importantly, in drawing heavily on the 'formal channels of disagreement' available to legislatures, the strong-/weak-form typology risks purporting the false perception that ss. 33 and 1 are the only two means with which the legislatures interact with the Court.[74] Methodological issues aside, the benefit of dialogue theory is its ability to demonstrate that Canadian legislatures have a third dialogic instrument at their disposal: responding to judicial invalidation through ordinary legislation[75] in ways that "reverse, modify, or avoid a judicial decision."[76]

In analyzing sixty-five *Charter* cases heard by either the SCC or lower appellate courts, dialogue theorists Hogg and Bushell (1997) studied the frequency of legislative responses to judicial invalidation. They found that in a majority of cases (80 per cent), the legislatures responded to the courts.[77] In their follow-up study, Hogg, Bushell-Thornton and Wright (2007) analyzed twenty-three additional *Charter* cases. Their study revealed, yet again, that the

[72] Tushnet 2003, 89.
[73] Kavanagh 2015, 1031.
[74] Kavanagh 2015, 1010 &1038.
[75] Hogg and Bushell 2001, 108.
[76] Hogg, Bushell-Thornton and Wright 2007, 45.
[77] Hogg and Bushell 1997, 97.

legislatures frequently responded to unpopular court rulings through legislative amendment (sixty-one per cent).[78]

Both studies were essentially responses to the counter-majoritarian critique of judicial review advanced by right-wing critics. Hogg and his co-authors sought to demonstrate that in spite of the Court's enhanced powers post-1982, and in spite of Canadian courts' activist approach to constitutional review, the *Charter of Rights* had not radically transformed the institutional roles of the legislatures and courts; the high number of legislative responses to judicial invalidation recorded in both studies demonstrates that policymaking power continues to reside with the legislatures.[79] Contrary to judicial critics, dialogue theorists argue that judicial review actually enhances the democratic process as it serves as a check on unconstrained legislative power, and because it forces legislatures to be better aware, and more respective of, rights.[80]

In spite of its contributions, there are a number of methodological and conceptual issues with Hogg and Bushell's (1997) study that render their findings questionable. First, Hogg and Bushell (1997) restrict their analysis to cases where the courts' chosen remedy was invalidation, thus biasing both their sample and results. Omitting cases of suspended invalidation or amendment is problematic given that "judicial nullification is the selected remedy in a minority of successful *Charter* claims (46% between 1984 and 1987)."[81] Additionally, and perhaps more importantly, the exclusion of these cases is problematic because it ignores the fact that different types of judicial remedies invite different types of legislative responses. When the court's chosen remedy is suspended or immediate invalidation, courts provide legislatures with the opportunity

[78] Hogg, Bushell-Thornton and Wright 2007, 51 & 54.
[79] Roach 2001(b), 482-83; Hogg and Bushell 1997, 79-80, 97 & 105; See also Kelly (In progress), 43.
[80] Roach 2001(b), 484.
[81] Manfredi and Kelly 1999, 515.

to remedy the constitutional defects themselves. As a result, these types of remedies invite independent legislative responses. In cases of judicial amendment, the court chooses to remedy the constitutional defects of the statute and, as a result, discourages independent legislative responses.[82] As Macfarlane (2012) demonstrates, higher levels of legislative activism (or legislative responses) were reported in cases where the chosen remedy was suspended invalidation (36%), in comparison to lower levels reported in cases of immediate invalidation (16%), and extremely low levels in cases of judicial amendment (6.25%).[83]

The second limitation of Hogg and Bushell's (1997) study proceeds from its inclusion of lower appellate court decisions. This is problematic given that several cases included were subsequently appealed to the SCC and overturned, demonstrating that "lower court rulings are simply too unstable to provide unequivocal evidence of dialogue."[84]

The third (and most serious) limitation derives from how Hogg and Bushell (1997) conceptualize and measure dialogue. For these scholars, all legislative responses, even in cases where legislatures comply with the court, are classified as dialogue.[85] The drawback of the approach advanced by Hogg and Bushell (1997) is that it looks exclusively at whether there was a legislative response, but fails to evaluate the substance or content of the response.[86] As Manfredi and Kelly (1999) rightfully suggest, there needs to be a clear distinction between negative and positive responses if dialogue is to be a useful tool for studying interinstitutional policy dynamics. According to these scholars, negative responses include the following situations: first, where the legislature does not respond and thus accepts judicial invalidation; second, where the responsible legislature repeals the unconstitutional statute; and finally, where

[82] Leclair 2004, 554.
[83] Macfarlane 2012, 49-50.
[84] Manfredi and Kelly 1999, 516.
[85] Morton 2001, 111; Hogg and Bushell 1997, 98.
[86] Petter 2007, 152-53; Morton 2001, 111; Manfredi and Kelly 1999, 520-21; Macfarlane 2012, 44.

legislation is amended as requested by the Court. These three types of reply legislation are classified as negative dialogue because the legislatures have chosen to either abandon the statute altogether, or have amended/re-drafted legislation in ways that drastically change the substance of the statute and which distort the original policy objectives. In any event, these types of reply legislation make no attempt to "challenge the judicial interpretive monopoly" and, as a result, welcome judicial policymaking.[87] Alternatively, positive dialogue includes responses where the legislatures revise statutes in ways that challenge the Court, and which remain committed to their original policy objectives. In these cases, judicial power is constrained by legislatures' unwillingness to comply with, and thus implement, the Court's decision.[88]

The benefit of Manfredi and Kelly's (1999) classification scheme is its focus on both the *number* and *nature* of legislative responses to judicial declarations of unconstitutionality. However, the classification scheme is limited insofar as it counts all instances where a law is repealed, even when it is subsequently replaced, as examples of negative dialogue, and thus potentially understates Canada's dialogic potential. Macfarlane (2012) improves the negative/positive typology advanced by Manfredi and Kelly (1999) by conducting a more in-depth analysis of cases where legislation is repealed and replaced to determine whether it is replaced in ways that challenge the Court (positive dialogue), or replaced in ways that comply with the Court (negative dialogue).[89] Nonetheless, Macfarlane's (2012) approach to testing dialogue is also problematic because it counts all legislative responses that depart from the Court's reasoning, even when minimal, as examples of positive responses.[90] It ignores, therefore, the distinction between major legislative amendments (negative dialogue), or drastic changes to

[87] Manfredi and Kelly 1999, 520-21 & 524.
[88] Manfredi and Kelly 1999, 520-22.
[89] Macfarlane 2012, 44.
[90] Macfarlane 2012, 48.

legislation, and minor legislative amendments (positive dialogue), or minimal changes to legislation. Whereas the former creates conditions favorable to judicial policymaking, the latter does not.[91]

In spite of these caveats, the critics of dialogue theory, in utilizing the negative/positive typology, have demonstrated the inherent weaknesses in dialogue theorists' measurement of 'dialogue.' In studying the same sample of cases in Hogg and Bushell's (1997) study, Manfredi and Kelly (1999) found that only thirty-three per cent of cases could be classified as positive dialogue.[92] In analyzing the Supreme Court's *Charter* docket (1982-2009), Macfarlane (2012) demonstrated, yet again, that dialogue theorists have exaggerated Canada's dialogic potential: only 17.8 per cent of cases examined were examples of positive dialogue.[93]

Dialogue theorists are likely to criticize the positive/negative approach to testing dialogue theory on the basis that it casts "the notion of dialogue too narrowly," and thus underestimates Canada's dialogic potential.[94] Here it is important to recall that the central argument advanced by Hogg and his co-authors is that the legislatures can (and frequently do) respond to judicial invalidation, which is taken to mean that judicial activism can (and often will) be constrained via legislative activism.[95] In utilizing the positive/negative typology, scholars Manfredi and Kelly (1999) and Macfarlane (2012) have demonstrated, however, that positive legislative sequels *infrequently* follow judicial invalidation. For dialogue theorists, the low levels of legislative responses recorded in these studies appear to raise democratic concerns because it suggests that, in a majority of cases, courts have 'final say.' However, once one considers a number of factors

[91] Manfredi and Kelly 1999, 521-22.
[92] Manfredi and Kelly 1999, 521.
[93] Macfarlane 2012, 46-7.
[94] Hogg and Bushell 1997, 98.
[95] Hogg, Bushell-Thornton and Wright 2007, 45.

that motivate – or, conversely, discourage – legislative responses, Manfredi and Kelly's (1999) and Macfarlane's (2012) findings are neither alarming nor surprising.

In Canada, as elsewhere, adjudication delays mean that, in most cases, the Supreme Court reviews legislation that was introduced by a previous government; by the time the *Charter* case gets to the SCC, the government responsible for introducing legislation is no longer in power.[96] In this respect, governments are habitually 'involuntary participants' in the constitutional challenge, and are thus not necessarily concerned with the outcome of the case. As Manfredi (2016) argues, in cases where incumbent governments disagree with the policy choices of previous governments, they are likely to "welcome judicial intervention against it," and are thus likely to introduce a negative dialogic response. However, in cases where government supports the policy choices of previous governments, the expectation is that they are likely to disapprove of the Court's decision, and are thus likely to introduce a positive dialogic response. [97]

Further, not all cases of statutory invalidation will witness a 'positive' dialogic response because not all cases heard by the Supreme Court involve salient and/or controversial issues of public policy. The expectation is that in high-profile cases, such as those dealing with abortion, same-sex marriage and safe injections facilities, to name a few, judicial invalidation will generally provoke a positive legislative response because they involve core policy areas of provincial and/or federal jurisdiction. In Canada, a very small minority of *Charter* cases address salient issues of public policy, which explains why, in most cases, legislatures introduce negative dialogic responses to address judicial invalidation.[98]

For reasons already explored, dialogue theory – specifically its assertion that Canada operates as weak-form – has lost its theoretical appeal. Nonetheless, the negative/positive

[96] Macfarlane 2018, 7; Manfredi 2016, 3; Kelly (In progress), 9.
[97] Manfredi 2016, 3.
[98] Kelly (In progress), 14-5.

approach to testing dialogue theory can be useful as a means of analyzing legislative responses to judicial declarations of invalidity in an attempt to understand how legislatures can constrain judicial power and policymaking under the *Charter*.[99]

2.4 Beyond Dialogue Theory: Courts as Implementer-dependent Institutions

For most of the *Charter*'s history, court-centric approaches, which focused heavily on judicial activism and legal mobilization efforts, constituted the dominant approach to the study of judicial power and judicialization in Canada. In more recent years, scholars have sought to understand how the legislatures can, as the designers and implementers of public policy in response to judicial invalidation, constrain the policy impact of the Supreme Court of Canada under the *Charter*. In particular, these scholars have demonstrated that right-wing critics, in adopting judicial-centred approaches, have perhaps mistakenly overstated the Court's policy influence post-1982. Overall, however, the judicial policymaking literature suffers from four limitations:

1. existing work on policy outcomes has largely been based off of a single case, rendering it questionable whether reported findings reflect judicial policymaking in Canada more generally;
2. no scholar has yet studied the policy legacy of the McLachlin Court;
3. the Supreme Court of Canada's policy impact remains "an understudied topic in the Canadian context,";[100] and
4. the judicial policymaking literature has generally been divorced from formal theory.

The present research seeks to address all four limitations. It does so in the following ways. First, it analyzes SCC-legislative policy interactions involving *Charter* cases (primary legislation) that have come before the McLachlin Court. Second, it contributes to the limited

[99] Roach 2019, 271-72.
[100] Macfarlane 2018, 395; See also Moore 1992, 548.

scholarship on judicial policy impact in Canada. Finally, it tests Matthew Hall's (2010) theory of Courts as implementer-dependent institutions, and modifies its application in a parliamentary democracy such as Canada's. Thus, the research project attempts to address the existing limitations in the scholarly debate involving the judicialization of politics, with a specific focus on the McLachlin Court.

Matthew Hall's (2010) theory is that judicial power is not absolute, but conditional, as courts are 'implementer-dependent' institutions that are reliant on lower courts, as well as Congress and the state legislatures in the United States, to implement judicial rulings. In this respect, he encourages scholars to move away from asking 'is the Court powerful?' to a more fundamental question that suggests that judicial power can be constrained via implementation – 'under what conditions is the Court powerful?' In so doing, Hall's theory serves as a reminder that judicial decisions invalidating the constitutionality of statutes do not automatically translate into policy outcomes. Given that the Supreme Court, as the highest judicial body, is not in a position to implement its decision, judicial policy impact is dependent on whether the actor responsible for implementation accepts a judicial ruling, and attempts to implement a judicial decision consistent with the Court's ruling.[101]

In his study, Hall (2010) makes a distinction between vertical and lateral issues, in which a Supreme Court is dependent on a particular type of actor to implement its ruling. For instance, in cases where Supreme Court decisions are implemented by lower courts (vertical issues), compliance is almost always guaranteed and judicial impact is direct and sustained, regardless of whether the decision is 'popular.' This claim rests on norms of collegiality and lower courts' respect for the judicial hierarchy. However, in cases where non-judicial actors must implement the Court's decision (lateral issues), compliance depends heavily on whether the Court's ruling is

[101] Hall 2010, 14-18; See also Rosenberg 2008, 31.

'popular.' As Hall suggests, legislators may be less inclined to implement Court rulings in cases where American voters clearly oppose the judicial decision. Two reasons explain this. First, government is not bound by the same norms of collegiality, suggesting that, unlike lower courts, government is not under a professional obligation to comply with the Supreme Court's ruling. Second, politicians require the political support of voters to get reelected, implying that, unlike the courts, they are highly vulnerable to public pressure.[102]

In testing his theory, which was developed in the context of judicial politics in the United States, Hall (2010) uses public opinion polls as a measure of the popularity of the Court's ruling in lateral issue areas.[103] However, the transferability of the theory to the study of the Supreme Court of Canada, particularly the proxy he develops for measuring the popularity of judicial decisions, is problematic when one considers a number of important institutional differences between the United States and Canada:

1. Canada has a system of strong-party discipline, which the U.S. lacks, suggesting that Members of Parliament (MPs) tend to always toe the party line;[104]

2. In Canada, power is concentrated in the hands of the Prime Minister and (perhaps) his/her Cabinet, suggesting that there are fewer veto points, and therefore lower chances that public opinion will infiltrate the legislative process, when compared to the U.S. where there is greater debate and where there are multiple avenues for legislation to be opposed – for example, "by individual officeholders, party functionaries, interest groups, or dues-paying members;"[105]

[102] Hall 2010, 15-18.
[103] Hall 2010, 24; Kelly 2018, 251.
[104] Schwartz and Tatalovich 2009, 94, 95 & 97; Watts 1987, 783.
[105] Schwartz and Tatalovich 2009, 94, 95 & 97; See also Watts 1987, 783; See also Kelly (In progress), 33-4.

3. Midterm elections in the United States serve as an additional means through which voters can express their dissatisfaction with elected representatives. Given that members of Congress have a vested interest in getting re-elected, midterm elections serve to "limit the distance that political actors can travel away from public opinion on salient issues of public policy;"[106]

4. Canada has a multi-party system, suggesting that the incumbent government can dominate the house on a plurality of the vote. This suggests that public opinion operates very differently in a two-party Congressional system based on divided government, in comparison to a multi-party system characterized by a concentration of power, and;

5. Registered voting in the U.S., which is inexistent in Canada, suggests that there is greater awareness of voters' opinions on particular issues, encouraging officeholders to govern in ways that respect such opinions in an attempt to increase their chances of getting re-elected in succeeding elections.

These institutional differences suggest that, in Canada, opinion polls may be less useful as a measure of the popularity of the Court's decision, given that the legislative arena is far more immune to public pressures than in the United States. Arguably, in Canada, the 'popularity' of the Court's decision rests fundamentally on the incumbent government's position on a particular issue – i.e., their party's campaign platform. Issue salience is central to any discussion on legislative activism and its capacity to constrain judicial power given that, as previously suggested, not all cases of judicial invalidation equally incentivize positive dialogic sequels. The benefit of campaign platforms is its capacity "to identify the importance of a policy issue to the government of the day," and thus its ability to explain what does (or does not) motivate legislatures to respond to Court declarations of statutory invalidity.[107] In short, the expectation is

[106] Kelly (In progress), 34.
[107] Macfarlane 2018, 409.

that in cases where the Court's decision does not challenge the policy objectives of incumbent governments, the outcome is likely to be a negative dialogic response and, as a result, the Court will yield significant policy influence. However, in cases where the Court challenges the policy choices of legislatures, government is likely to introduce a positive dialogic sequel and, as a result, they will be in a position to limit the policy impact of judicial decisions.

In spite of this limitation, the utility of Hall's (2010) theory is the ability to draw distinctions based on the Supreme Court's power during the different stages of the policy lifecycle. The Court – given its ability to review and strike down unconstitutional legislation, and, therefore, its capacity to 'force' issues onto legislative agendas – plays a key role as an 'agenda-setter.'[108] However, when one considers the other stages of the policy lifecycle, namely formulation (or design) and implementation, the Court lacks the manpower and resources necessary to enforce their decisions. Accordingly, they may be less powerful at these stages than originally perceived by right-wing critics.[109]

Here it is important to recall that three factors contribute to the judicialization of politics: the existence of a constitutional bill of rights that empowers the courts as policymakers; an independent and activist final appellate court; and, most importantly, a political environment that creates conditions favorable to judicialization.[110] The inclusion of a strong remedial provision in the *Charter* (s. 24(1)), combined with the Court's activist approach to judicial review, suggests that the first two conditions are met in Canada. However, right-wing critics have thus far failed to demonstrate whether the 'political environment' creates conditions hospitable (or hostile) to judicialization. In applying Hall's theory of Courts as 'implementer-dependent' institutions, the present paper seeks to fill this gap by demonstrating that judicialization depends on which actor

[108] Kelly (In progress), 7-8.
[109] Hall 2010, 12 & 15.
[110] Hirschl 2009, 270.

is responsible for implementing the Court's decision (judicial or non-judicial) and, in the case of lateral issues, whether the decision is *popular*.[111]

Other scholars have made similar points. Rosenberg (2008) – in drawing on the theory of the 'constrained court', which was developed in the context of judicial policymaking in the United States – suggests that Supreme Courts lack the ability to "bring their decision[s] to life" as they lack the ability to implement their rulings.[112] Likewise, Moore (1992)[113] and Macfarlane (2018) [114] demonstrate that without the support of non-judicial actors, the Court *cannot* effectively shape public policy outcomes. While it might be too premature to claim that Hall's theory is a good fit for explaining interinstitutional policy dynamics in Canada, there is some evidence to suggest that this might be the case. Kelly's (2018) analysis of the Charter of the French Language, for example, demonstrates that despite a series of strong judicial decisions invalidating section 73, these invalidations have "not produced consequential policy change."[115] Similarly, Moore (1992) studied a number of cases involving police implementation of the SCC's *Charter* decisions. Her findings suggest that in cases where the police disagreed with the Court's ruling, the decision was ineffectively implemented.[116]

Arguably, Hall's theory (2010) of final appellate courts as implementer-dependent institutions has the potential to enrich our understanding of judicial policy influence in Canada. However, it is important not to overstate its explanatory power. Hall's theory is limited insofar as it assumes that the Supreme Court of Canada *always* behaves as an implementer-dependent institution. While this holds true a majority of the time, this is not true of every case. Under section 24(1) of the *Charter*, courts are provided wide latitude in deciding which remedy they

[111] Hall 2010, 18.
[112] Rosenberg 2008, 26.
[113] Moore 1992, 551.
[114] Macfarlane 2018, 4.
[115] Kelly 2018, 265.
[116] Moore 1992, 553.

believe to be 'appropriate and just in the circumstances.' When the Court suspends or immediately invalidates legislation, they grant the legislatures the opportunity to introduce an independent legislative response to address judicial invalidation. In these cases, the Supreme Court behaves as an 'implementer-dependent' institution because judicial power depends on whether, and how, federal and/or provincial legislatures respond to the Court's remedial activism.[117] In cases where the Court chooses to amend legislation, the Court does not behave as an 'implementer-dependent' institution. In 'reading-in' (adding sections to statutes), 'reading-down' (removing sections) or severing statutes (removing/adding words or sentences),[118] the Court chooses to remedy the constitutional defects themselves, and thus does not require that the legislatures (or other non-judicial actors) comply with, and thus implement, their ruling.[119] In spite of this caveat, it appears that Hall's theory applies to a significant majority of 'activist' *Charter* cases. In only 23 out of the 93 activist *Charter* cases (1982-2018) was the Supreme Court of Canada's chosen remedy judicial amendment. Stated differently, in roughly 75 per cent of these *Charter* cases, the chosen remedy was immediate or suspended invalidation.[120]

2. 5 Addressing the Gaps in the Existing Constitutional Literature in Canada

This review has drawn on three bodies of literature that are relevant to the present study: the judicialization of politics literature, the judicial policymaking literature, and dialogue theory. In so doing, it has raised a number of limitations that need to be addressed in an attempt to gain a better understanding of judicial power and policymaking in Canada under the *Charter of Rights*.

[117] Kelly (In progress), 22-3.
[118] Macfarlane 2012, 49.
[119] Kelly (In progress), 23.
[120] Kelly (In progress), 23-5.

As this chapter has demonstrated, conservative critics have shown that the Court, given their 'strong-type' remedial powers under section 24(1)) of the *Charter*, play an important role as 'agenda-setters.' They have thus far failed to demonstrate, however, whether judicial invalidation actually results in fundamental policy change. In adopting judicial-centered approaches, these scholars have overlooked the crucial role played by legislatures in constitutional politics as the *designers* and *implementers* of public policy in response to judicial invalidation. For this reason, they have potentially exaggerated the policy influence and impact of the Supreme Court of Canada post-1982.

Against this backdrop, one of the benefits of dialogue theory is its capacity to demonstrate that judicial activism can be constrained via legislative sequels that challenge or reverse Court decisions. Dialogue theory, therefore, is a useful analytic tool for understanding "how such responses […] frame judicial decisions," and thus how legislatures can constrain judicial power and policymaking under the *Charter of Rights*.[121] To date, however, the dialogue literature has focused heavily on how to accurately conceptualize, measure and test dialogue. While these are important debates to engage with, it has unfortunately come at the cost of empirical work on the topic. Indeed, relatively few scholars have employed dialogue theory (and the negative/positive distinction) as an analytical tool for understanding judicial power and the Court's policy impact and influence.

An additional limitation is that studies on the policymaking power of the Supreme Court of Canada have tended to be divorced from formal public policy theories. Most surprising, however, is the fact that no scholar has yet studied the policy impact of the McLachlin Court – and yet it is doubtful that this inattention arises from scholarly or public disinterest. Indeed, the McLachlin Court is quite often depicted as "[…] [having] seen a lot of change in this country,

[121] Roach 2019, 271-72.

and [having] helped provoke some of it, too."[122] The recent retirement of Chief Justice Beverly McLachlin, coupled with her extremely long tenure as Chief Justice and her reputation as a policy-influencer, thus create a unique opportunity to study the policy impact of her Court.

In light of the aforementioned, the contributions of the thesis are three-fold. First, the findings of the research can be used to inform the 'judicialization' and the 'democratic legitimacy' debates in Canada – debates which appear to be unsettled. Second, it contributes to theory-building and testing initiatives in Canada by modifying Hall's (2010) theory of the Supreme Court as an 'implementer-dependent' institution and applying it to the study of the McLachlin Court's policy influence and impact. Third, it contributes to the relatively limited scholarship on judicial power and policymaking in Canada.

[122] Delacourt 2017.

3

The Harper Conservatives and Criminal Justice Policy

The chapter reviews two high-profile cases involving salient issues of criminal justice policy delivered by the McLachlin Court, namely *PHS Community* (safe injection facilities) and *Bedford* (prostitution reform). The chapter considers the Harper Conservatives' responses to both cases, which include Bill C-2 – An Act to Amend the Controlled Drugs and Substances Act (Respect for Communities Act) – introduced in 2015 in response to *PHS Community*, and Bill C-36 – Protection of Communities and Exploited Persons Act – introduced in 2014 in response to *Bedford*. Additionally, the chapter reviews the Trudeau Liberals' response to *PHS Community* (Bill C-37).

PHS Community and *Bedford* provide for particularly interesting cases given that the Harper government is often portrayed to have had a "combative relationship with the Supreme Court of Canada" during their time in power.[1] This narrative is not surprising, however, given the Harper Conservatives' law and order agenda.[2] The 2011 Conservative campaign, *Here for Canada*, demonstrates the extent to which criminal policy was a top priority for their government; from guarantees to 'keep streets safe,' to promises to 'protect law-abiding citizens,' the Harper Conservatives' platform was fraught with penal populist rhetoric.[3]

In both *PHS* and *Bedford*, the Supreme Court advocated for 'harm-reduction' policy responses that would liberalize access to safe injection facilities and that would create safer conditions for sex workers, respectively. Unsurprisingly, the Court's decisions proved to be

[1] Macfarlane 2018, 1.
[2] Kelly and Puddister 2017, 406; See also Kelly (In progress), 7.
[3] Conservative Party of Canada 2011, 45 & 50.

unpopular with the Conservative government.[4] It is not coincidental, therefore, that the strong-type decisions delivered by the Court in *PHS Community* and *Bedford* witnessed equally strong legislative responses by the Harper Conservatives consistent with, and reflective of, their 'tough on crime' policy strategies. In *PHS Community*, the Court required that the federal Minister of Health immediately grant Insite, a safe injection facility in the Downtown Eastside, an exemption, which would allow it to temporarily operate free from criminal prosecution under section 4(1) (possession of narcotics) of the Federal *Controlled Drugs and Substances Act* (*CDSA*). In this respect, the Conservative government fully complied with the Supreme Court's decision. Bill C-2, however, introduces a series of twenty-six conditions that must be met before the Minister of Health can consider, let alone grant, an exemption for safe injection sites. In so doing, the federal government sought to ensure that no other safe injection facility, with the notable exception of Insite, would be granted an exemption under the *CDSA*.

Similarly, in *Bedford*, the Supreme Court struck down three prostitution-related provisions of the *Criminal Code*. In response, the Harper Conservatives introduced Bill C-36. The inclusion of ss. 286.2(1) ('material benefit'), 286.2(3) ('financially profiting') and 213(1)(c) ('communicating') reintroduced the *Criminal Code* prohibitions invalidated by the McLachlin Court in *Bedford*. More telling, however, is the fact that Bill C-36 effectively criminalizes prostitution in Canada for the first time in its history.

The chapter argues that while the Supreme Court of Canada undeniably plays an important role as 'agenda-setters,' they lack the power to enforce and implement their decisions. In particular, it argues that in cases dealing with unpopular lateral issues – in this case, safe injection facilities and prostitution reform – the federal government will likely introduce positive legislative sequels. Indeed, the Harper Conservatives' response to *PHS Community* and *Bedford*

[4] Kelly (In Progress), 9.

– namely, the grueling application process for establishing new safe injection facilities (in response to *PHS Community*), and the new provisions regulating prostitution in Canada (in response to *Bedford*) – are reflective of legislative noncompliance. Thus, both cases illustrate the limits of legal mobilization efforts. The Harper Conservatives, as the designers and implementers of public policy in response to judicial invalidation, were able to introduce legislation that was fundamentally at odds with the constitutional parameters established by the McLachlin Court in *PHS Community* and *Bedford*. In both cases, therefore, the policy impact of the SCC was limited.

The chapter begins with an overview of *PHS Community*, including a summary of the constitutional issues raised in the case, the litigants involved, the statutes being challenged and the decisions delivered by the lower courts. It then reviews the Supreme Court's decision, focusing specifically on the remedy employed under section 24(1) of the *Charter*, followed by an analysis of the Harper Conservatives' response (Bill C-2) to the Court's decision in *PHS*. The remainder of the chapter focuses on the constitutional challenge waged in *Bedford*, which follows a similar pattern to that employed in the context of *PHS Community*. Finally, the chapter analyzes the findings, with a specific focus on Hall's (2010) theory of the Supreme Court of Canada as an 'implementer-dependent' institution.

3.1 Overview of *PHS Community*

In the mid- to late-1990s, the city of Vancouver, particularly the Downtown East Side (DTES) neighborhood, which is known to be the "poorest postal code" in Canada,[5] experienced an unprecedented level of deaths related to intravenous drug use, thus sparking a health crisis in the community.[6] By 1998, reported rates of HIV/AIDS and Hepatitis A, B and C in the DTES – a

[5] Ward 2012, 195; Lessard 2011, 95.
[6] Agarwal 2011, 41; Kerr, Mitra, Kennedy and McNeil 2017, 1.

neighborhood notorious for being home to a large number of intravenous drug users, and for having extremely high rates of crime, poverty, prostitution and homelessness[7] – had reached "epidemic proportions," with roughly 417 deaths caused by the unsafe and unsanitary sharing of needles and other consumption practices.[8] Addiction was rampant in the DTES, with most addicts injecting in alleys or other unsafe areas, typically far from trained medical staff, out of fear of being prosecuted under the federal *Controlled Drugs and Substances Act* (*CDSA*) for the possession (section 4(1)) and/or trafficking (section 5(1)) of illicit narcotics.[9]

In 2002, the Vancouver Coastal Health Agency (VCHA) submitted a proposal centred on harm-reduction strategies, seeking to establish a safe injection facility (SIF) in the DTES where addicts could safely inject drugs, and where trained medical personnel could monitor and supervise in an attempt to decrease the total number of fatal overdoses.[10] They applied for a ministerial exemption under section 56 of the *CDSA*, which would subsequently allow Insite to operate free from criminal prosecution under sections 4(1) and 5(1). In September 2003, under the Chrétien Liberals, the Minister of Health granted Insite – Canada's first ever injection facility – a three-year exemption; it was officially opened to the public on September 21st of that same year.[11] The Conservative government later extended the exemption until June 2008.[12]

Insite was in large part the outcome of combined efforts by local (the DTES), provincial (Vancouver) and federal authorities and governments seeking a solution to the health and safety risks faced by drug users in the DTES.[13] With the election of the Harper Conservatives in 2006, however, the years of cooperative federalism, which marked the first three years of Insite's

[7] Ward 2012, 195; *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at para 9.
[8] Lessard 2011, 97.
[9] *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at para 10.
[10] Ibid., at para 13-4.
[11] Agarwal 2011, 42; See also Young 2011, 231.
[12] Ka Hon Chu 2010, 92; Manfredi and Maioni 2018, 32.
[13] *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at para 19.

operation, appeared to be coming to an end. In 2008, when it became clear that the Conservative government would not issue any further exemptions, the Portland Hotel Community Services Society (PHS Community), the non-profit organization responsible for managing Insite, and the Vancouver Area Network of Intravenous Drug Users (VANDU), a drug-user organization in Vancouver, sought relief in the courts.[14] In their constitutional challenge, the Attorney General of British Columbia, and Dean Edward Wilson and Shelly Tomic – two members of the DTES who frequent, or had previously frequented, Insite – joined PHS in their constitutional challenge.[15] For simplicity, the chapter will hereafter use 'PHS' to refer collectively to PHS Community, VANDU, the Attorney General of British Columbia and litigants Wilson and Tomic.

Two issues were at the centre of the constitutional challenge in *PHS*. The first concerned the interjurisdictional immunity doctrine, whereby PHS argued that the *CDSA* is inapplicable to Insite given that it involves health policy, a core area of provincial jurisdiction. The alternative claim centred on section 7 of the *Charter*, whereby PHS sought to demonstrate that the prohibitions under sections 4(1) and 5(1) of the *CDSA* infringed the right to 'life, liberty and security of the person' in a manner inconsistent with the principles of fundamental justice.[16] They argued that the prohibition served as a barrier to "essential healthcare services" that were shown to drastically improve the lives of intravenous drug users and, as a result, that the Conservative government's failure to extend the exemption unjustifiably put the health and lives of users in the DTES at risk.[17]

[14] Ka Hon Chu 2010, 92.
[15] *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at para 22.
[16] Lessard 2011, 93.
[17] Young 2011, 237.

The arguments advanced by the Crown, on the other hand, were consistent with the Harper Conservative's 'tough on crime' approach to criminal justice policy. They sought to demonstrate that the crisis faced by the DTES community had less to do with the prohibitions under the *CDSA*, and more to do with consumer 'choice' and 'lifestyle,' in effect implying that consumers had to take responsibility for the outcomes (i.e., death and disease) that they themselves caused and/or enabled (i.e., through drug consumption).[18] As a result, the federal government, represented by the Attorney General of Canada, contended that s. 7 rights had not been infringed by government's decision to "prohibit access to safe injection facilities."[19]

The trial judge, Pitfield J., dismissed the interjurisdictional immunity claim, basing his decision in large part on the doctrine of paramountcy.[20] With respect to section 7, Pitfield J. concluded that the right to 'life, liberty and security' had been infringed by ss. 4(1) and 5(1) of the *CDSA*, and that this infringement was not justifiable under s. 1 of the *Charter*; his declaration of invalidity was suspended for one year.[21] Justice Pitfield further granted Insite an immediate exemption under s. 56(1), which allowed it to operate free from criminal prosecution.[22]

Pitfield J.'s decision was grounded on three factual findings: first, that addiction was the product of illness as opposed to choice; second, that the high rates of blood-borne illnesses among drug users in the DTES were a direct cause of unsafe and unsanitary consumption practices; and finally, that injecting drugs in a safe area, surrounded by trained healthcare professionals, would drastically decrease the risk of overdose, death and disease. These findings were based off of the Expert Advisory Committee's report, which detailed a number of health and safety improvements following the establishment of Insite. For example, the report showed

[18] Lessard 2011, 106; Young 2011, 237 & 243; *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at para 97.
[19] Young 2011, 237.
[20] Agarwal 2011, 42; Ward 2012, 198.
[21] Ward 2012, 198; *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at para 31.
[22] Ibid., at para 31.

that drug-related crime and relapse rates had not increased in the DTES, and that the number of users injecting in public (and unsafe) areas had actually decreased.[23]

Both the federal government and PHS appealed Pitfield J.'s decision to the British Columbia Court of Appeal (BCCA). The Attorney General of Canada appealed the decision on the basis that sections 4(1) and 5(1) of the *CDSA* were constitutional. PHS appealed the decision on the grounds that Justice Pitfield was wrong to dismiss the interjurisdictional immunity claim, and secondly, that he erred in finding that s.56 of the *CDSA* was constitutional.[24]

Two judges on the BCCA, Justices Rowles and Huddart, ruled in favor of the claimants with respect to both the interjurisdictional immunity and the section 7 claims.[25] The federal government later appealed the decision of the BCCA to the Supreme Court of Canada, and was granted the leave to appeal on June 24th, 2010.[26]

3.2 The Supreme Court of Canada: *Canada* (*Attorney General*) *v. PHS Community Services Society* [2011]

The Supreme Court of Canada delivered its judgment in *PHS Community* on September 30th, 2011. A total of fourteen interveners, all of whom supported the legal arguments advanced by PHS, were present at trial, including: the Attorney General of Quebec, the Canadian Nurses Association, the British Columbia Civil Liberties Association, the Canadian HIV/AIDS Legal Network and the Vancouver Coastal Health Authority, among others.[27] Similar to both lower courts, the SCC was asked to determine whether sections 4(1) and 5(1) of the *CDSA* were inapplicable to Insite insofar as they contravened the interjurisdictional immunity doctrine. They

[23] Ibid., at para 27-8.
[24] Young 2011, 235.
[25] Young 2011, 235; Ka Hon Chu 2010, 91.
[26] Ward 2012, 199.
[27] *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134.

were further asked to determine whether the relevant provisions violated section 7 and, if applicable, whether they constituted a justifiable infringement on *Charter* rights.[28]

With respect to the interjurisdictional immunity (or division of powers) argument, Chief Justice McLachlin, writing for a unanimous Court, determined that in spite of provincial jurisdiction over healthcare matters, sections 4(1) and 5(1) of the *CDSA* were "constitutionally valid and applicable to Insite under the division of powers."[29] Thus, the crux of the SCC's decision stemmed from the section 7 claims.

In terms of section 7, PHS advanced three key arguments: first, that ss. 4(1) and 5(1) infringe the right to 'life, liberty and security;' second, that the Minister of Health's refusal to extend Insite's exemption violated section 7 *Charter* rights; and third, that the prohibition under section 4(1) (possession of illicit substances) infringed on the section 7 *Charter* rights of *all* drug users, as opposed to only Insite's clientele.[30]

In response, the federal government advanced two key arguments. The first argument was inherently moral, invoking the idea that because drug users *choose* to engage in illegal activity, that they should be responsible for the repercussions and consequences of their actions (i.e., criminal liability). Secondly, the federal government argued that the decision to allow (or disallow) the establishment of SIFs is an inherently political decision, and thus does not fall within the scope of judicial review under the *Charter of Rights*. McLachlin C.J. rejected both arguments. With respect to the former, she asserted that it was precisely the federal government's actions, as opposed to drug users' choice, which deprived addicts of their s. 7 rights. With respect to the latter, she claimed that while the federal government has exclusive jurisdiction

[28] Ibid., at para 36.
[29] Ibid., at para. 73.
[30] Ibid., at 75-7.

over how best to treat addiction and drug-related offences, "laws and [state] actions are [nonetheless] subject to scrutiny under the *Charter*."[31]

In *PHS Community*, McLachlin C.J. concluded that section 4(1) engaged Insite staff's s. 7 rights by rendering them liable to imprisonment for the illegal possession of drugs. She further claimed that s. 4(1) of the *CDSA* deprived users of their s. 7 rights; by criminalizing the possession of drugs on Insite's premises, it denied drug addicts access to potentially life-saving medical treatment. Chief Justice McLachlin, however, was less convinced that section 5(1) had engaged section 7 rights. In particular, she claimed that because neither clients nor staff obtained drugs directly from the safe-injection facility, that they were not actually partaking in any activities that would fall within the gambit of 'trafficking' under s. 5(1).[32]

In light of the objectives of s. 4(1) of the *CDSA*, namely, public health and safety, however, McLachlin C.J. argued that while s. 7 rights were evidently engaged, they had not been violated.[33] Rather, Chief Beverly McLachlin took issue with the Minister of Health's refusal to grant Insite an exemption, in spite of the evidence demonstrating that, overall, Insite had drastically improved the health and lives of addicts in the DTES. The Chief Justice asserted that while the Minster of Health has the discretion to allow (or refuse) exemptions for medical and/or safety reasons under s. 56, this discretion is not absolute.[34] For McLachlin C.J., the Minister of Health had an *obligation*, in deciding whether or not to extend the exemption, to consider the available evidence, including the fact that: no deaths had occurred since Insite opened its doors in 2003; that the public viewed Insite and its operation/mission rather favorably or, at the very least, neutrally; and finally, that Insite had not increased the incidence of crime, relapses and

[31] *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at para 102-03 & 105-06.
[32] Ibid., at para 90, 92 & 95-6.
[33] Ibid., at para 110 & 114.
[34] Ibid., at para 117.

overall drug use. McLachlin further asserted that, in considering these facts, the Minister of Health would have recognized that "exempting Insite from the application of the possession prohibition [did] not undermine the objectives of health and safety, but, [rather,] further[ed] them."[35]

According to the Court, the Minister's decision to deny Insite a further exemption, in spite of the evidence demonstrating its advantages, violated the principles of fundamental justice. It was arbitrary because it offended the very purpose of the *CDSA*, namely public safety and health. On the other hand, it also violated the principle of gross disproportionality because, according to the Court, the benefits associated with granting Insite a further exemption, namely reducing the number of fatal overdoes and deaths caused by unsafe consumption practices, far outweighed any potential policy benefit(s) derived from criminalizing the possession of drugs.[36]

In issuing its remedy, the Supreme Court contemplated returning the application to the Minister of Health, whereby the Minister would reconsider Insite's application in light of the issues raised in *PHS Community*. Unsatisfied with this option, particularly because the issue at stake involved the health and lives of users in the DTES, the SCC decided instead to order a writ of mandamus, obliging the Minister to grant an immediate, albeit temporary, exemption to Insite. According to the Chief Justice, the mere possibility that the Minister of Health would (yet again) refuse Insite's application justified the Court's choice of remedy: there is "nothing to be gained (and much to be risked) in sending the matter back to the Minister for reconsideration."[37]

At least to some degree, therefore, *PHS Community* is a clear case of the Supreme Court applying an interventionist remedy and of delivering a 'strong-type' decision. This becomes apparent when one considers that, under s. 56, the Minister of Health is simply required to grant

[35] Ibid., at para 119, 122 & 131.
[36] *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at para 131-36.
[37] Ibid., at 146-50; see also Manfredi and Maioni 2018, 33; see also Agarwal 2011, 41

an exemption if, *in their opinion*, such an exemption is vital to medical and/or scientific efforts, or if it is in the public interest to do so. However, nowhere does s. 56 instruct the Minister of Health on how they should exercise this discretion, or the criteria they should use in making such determinations.[38] Paradoxically, McLachlin C.J. explicitly stated that when "the evidence indicates that a supervised injection site will decrease the risk of death and disease, and [where] there is little or no evidence that it will have a negative impact on public safety, the Minister should generally grant an exemption."[39] In other words, the Supreme Court took the position that, only in rare cases, should the Minister of Health refuse to grant future exemptions.

The Court further listed five criteria that should guide the Minister of Health when reviewing applications, including the SIF's potential impact on crime, the regulatory system and financial resources in place, the reasons justifying the 'need' for an SIF in any particular community, and the community's approval (or disapproval).[40] In short, the Supreme Court maintained that the Minister of Health *did not* have unfettered discretion in deciding whether or not to issue future exemptions. As will be explored, however, Bill C-2, the Harper Conservatives' response to *PHS Community*, signaled their forceful disagreement with the Court's directives on how, and under what conditions, exemptions would be granted.

3.3 Bill C-2: The Harper Conservatives' Response to *PHS Community*

The Harper Conservatives responded to the Supreme Court's decision in *PHS Community* via the introduction of Bill C-2 (An Act to Amend the Controlled Drugs and Substances Act (Respect for Communities Act)), which received royal assent on June 15th, 2015. While not wholly surprising, the federal government's response is significant for two reasons. First, Chief Justice

[38] Agarwal 2011, 43; Manfredi and Maioni 2018, 32-3.
[39] *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at para 152.
[40] *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at para 153.

Beverly McLachlin authored a unanimous decision. The 'authoritativeness' associated with unanimous decisions means that governments rarely introduce legislative sequels.[41] More importantly, the chosen remedy in *PHS Community* applies exclusively to Insite; the Court took issue with the exercise of ministerial discretion, not the statute itself. To some degree, therefore, the federal government's choice to respond to *PHS Community* suggests that the Harper Conservatives interpreted the decision not only as an attempt to overrule the Minister of Health's decision, but also as a direct attack on their policy objectives and their law and order agenda.

Arguably, Bill C-2 is a reflection of the unpopularity of the Court's decision in *PHS Community*. In effect, Bill C-2 renders it relatively difficult, if not entirely impossible, for any safe injection facility, save for Insite, to obtain an exemption. Here it is important to recall that, prior to the introduction of Bill C-2, the Minister of Health, under section 56 of the *CDSA*, essentially had 'free rein' when deciding whether or not to authorize exemptions. It is also important to reiterate that, in *PHS Community*, the Supreme Court claimed that the Minister of Health, save for exceptional cases, should 'generally grant' exemptions.

Under section 56.1(3), the centerpiece of Bill C-2, however, twenty-six conditions must be met *before* the Minister of Health can consider, let alone grant, an exemption. For example, it requires that a safe injection facility be approved by: municipal governments (under s. 3(c)); municipal law enforcement (under s. 3(e)); the lead provincial health authority (under s. 3(g)); the provincial Minister of Public Safety (under s. 3(h)); local health professionals, including associations representing the interests of physicians and nurses (under s. 3(o); and by community groups residing in municipalities where SIFs are anticipated to operate (s. 3(p)). Objection by any of these six groups could, in theory, constitute sufficient grounds to reject applications.[42]

[41] McCormick 2005, 5; Macfarlane 2010, 401; Mathen 2003, 325 & 327.
[42] Canada, Parliament, *House of Commons Debates*, 41st Parl, 2nd Sess, (18 June 2015).

Sections 3(p) (community groups) and 3(e) (municipal police) are particularly high thresholds to satisfy. The fact remains that, at the very least, some Canadians may be hesitant towards the idea of having an SIF operate in close proximity to their homes and families. It is likely that section 3(p) is an even more difficult requirement to satisfy in neighborhoods where, unlike the DTES, poverty is less pervasive, the community is considerably safe, drug use is less common (or is relatively well hidden from the public) and/or where illegal drug markets are relatively restricted. With respect to section 3(e), it is likely that law enforcement officials, by the very nature of their job descriptions, will likely be unsympathetic to SIFs, and may, as a result, veto the establishment of SIFs in other jurisdictions. As is the case with the RCMP, law enforcement agencies in Ottawa and Toronto have reacted negatively to the idea of expanding SIFs in their municipalities; other cities may also have similar experiences.[43]

Additionally, the evidentiary thresholds set forth in sections 56.1(3)(a) and 56.1(3)(j) are particularly high. The former requires that applicants submit scientific evidence demonstrating the expected health/medical benefits of the SIF, while the latter requires applicants to submit evidence detailing the SIF's safety benefits. The fact remains, however, that the DTES is unique in terms of the high concentration of intravenous drug users in the neighborhood, a majority of whom have contracted some type of blood borne disease(s) caused by unsafe and unsanitary consumption practices. Whereas Insite can convincingly demonstrate the health and safety benefits of the SIF – namely, its ability to reduce the risk of disease and death among intravenous drug users – in other communities, where income, housing status, health and social services, and reported rates of drug use, for example, vary considerably, it may be more difficult to "demonstrate the public health [and safety] benefits commensurate with Insite."[44]

[43] Hyshka, Bubela and Wild 2013, 5.
[44] Hyshka, Bubela and Wild 2013, 5.

While the health and safety risks associated with intravenous drug consumption are particularly high in the DTES, they are by no means exclusive to this jurisdiction. Other Canadian cities, such as Montreal, Ottawa, Toronto and Victoria, have also expressed a desire to implement SIFs as a solution to the relatively high rates of injection drug use reported in these cities.[45] While Bill C-2 does not technically criminalize SIFs, the truth of the matter is that section 56.1(3) does, in practice, have the effect of prohibiting the establishment (or expansion) of new SIFs in Canada by making it virtually impossible for new SIFs to satisfy the requirements necessary to be eligible for Ministerial exemptions.

Recall that the SCC's remedy in *PHS Community* required that the Minister of Health, under the Harper Conservatives, grant Insite an immediate exemption. In this respect, they complied with the SCC's ruling. However, in introducing Bill C-2, the Conservative government, consistent with its law and order agenda, forcefully asserted its opposition to safe injection facilities as a legitimate policy solution to address the rising rates of intravenous drug use, disease and overdose in Canada. This is evidenced by the fact that, other than Insite, not a single SIF was granted an exemption post-Bill C-2. [46]

Stephen Harper's successor, Justin Trudeau, however, adopted a more sympathetic attitude towards the establishment of SIFs, and towards the SCC's decision in *PHS Community*. In 2017, the Trudeau Liberals repealed and replaced Bill C-2 with Bill C-37; Bill C-37 reduced the requirements listed under s. 56.1(3) from twenty-six to five. [47] These five conditions include a summary of: the reasons (for example, health and safety concerns) for submitting the application; the potential effect(s) of the SIF on crime rates in the community; any consultations held with the community on the prospect of opening an SIF in their neighborhood; the financial

[45] Kerr et al. 2017, 3.
[46] Kerr et al. 2017, 4.
[47] Kerr et al. 2017, 4.

resources used to ensure the proper 'upkeep' or 'maintenance' of the SIF; and lastly, the regulatory scheme in place.[48] In other words, it complied – nearly word for word – with the SCC's decision in *PHS Community*.

In drastically reducing the number of requirements, the Trudeau Liberals publicly displayed their desire to be far more 'open,' so to speak, towards the possibility of expanding SIFs to other communities facing similar health crises as that experienced in the Downtown East Side. It should come as no surprise, therefore, that within just a few short months of Bill C-37 coming into force, the Minister of Health granted the Dr. Peter Centre an exemption under the *CDSA*.[49] Presently, a total of forty-three SIFs exist across four different provinces: Alberta (7), British Columbia (9), Ontario (23), and Quebec (4).[50]

Consistent with Hall's (2010) theory of the Supreme Court of Canada as an 'implementer-dependent' institution, *PHS Community*, and the different policy responses adopted by the respective Conservative (Bill C-2) and Liberal governments (Bill C-37), demonstrates that the popularity of the Court's decision determines how legislatures respond. In *PHS Community*, the Supreme Court of Canada did not "fling the doors [wide] open" for SIFs in Canada.[51] This is in part explained by the fact that the McLachlin Court did not rule on the constitutionality of trafficking and possession laws *per se*. By the same token, however, the SCC did not "preclude the possibility of further facilities being established."[52] In claiming that the Minister of Health 'should generally' grant exemptions in cases where, similar to the DTES, SIFs would likely have positive effects on the health and safety of drug users in other

[48] Canada, Parliament, *House of Commons Debates*, 42nd Parl, 1st Sess, (18 May 2017).
[49] Kerr et al. 2017, 4.
[50] Government of Canada 2019.
[51] Ward 2012, 202.
[52] Ward 2012, 202.

communities, the SCC was signaling their preference for 'harm-reduction' methods, and, more specifically, their desire to expand SIFs to other jurisdictions.

Unsatisfied with the outcome of the case, the Harper Conservatives introduced Bill C-2. In so doing, they sought to ensure that the Minister of Health would never, save for extremely exceptional circumstances, grant exemptions. On the flipside, Bill C-37 is a clear indication of the Trudeau Liberals' commitment to treating SIFs as a viable policy response to drug addiction in Canada. Given the more liberal approach to SIFs adopted by Trudeau's government via Bill C-37 in 2015, it is likely that, had they been in power during the time that the SCC delivered its decision in *PHS Community*, they would have introduced a legislative response far more deferential than that adopted by the Harper Conservatives in Bill C-2.

Having considered the SCC's ruling in *PHS Community*, and the 'in your face' legislation introduced by the Harper Conservatives in response to the Court's decision, the remainder of the chapter focuses on the constitutional challenge waged in *Bedford*, which centered on three prostitution-related provisions of the *Criminal Code*.

3.4 Overview of *Bedford*

In 2007, Robert Pickton – an infamous serial killer suspected to have been responsible for the kidnapping, sexual assault and murder of countless women in the DTES, most of whom worked in the sex trade – was convicted on twenty-six counts of murder. Between 1978 and 2001, over sixty-nine women disappeared from the DTES, with most of these disappearances going unnoticed by law enforcement officials until months (or even years) later.[53] On the one hand, the Pickton case increased public awareness of the health and safety dangers associated with the sex trade – for example, the higher risk of sex workers being victims of sexual and/or physical

[53] Butts 2017.

assault.[54] On the other hand, the case prompted a lively discussion on the possible merits of further decriminalizing certain aspects of sex work in Canada.

Against this backdrop, the constitutional challenge waged in *Bedford* centred on three prostitution-related provisions of the *Criminal Code*: ss. 210 ("the keeping of a common bawdy house"), 212(1)(j) ("living off the avails of prostitution") and 213(c) ("communicating for the purposes of prostitution in a public space").[55] Section 210, for example, essentially restricts sexual exchanges between prostitutes and clients to the client's home or hotel rooms. In short, it denies prostitutes the right to work directly from their home, or from any other fixed location. Similarly, section 212 (1)(j), which was presumably enacted to criminalize pimp-related activities, has the effect of criminalizing the hiring of staff, for example drivers and bodyguards, which can arguably provide for safer working conditions for prostitutes. Additionally, section 213(1)(c) criminalizes street prostitution and restricts the selling of sex to non-public spaces, which can drastically impair sex workers' ability to screen clients.[56]

While prostitution in Canada is not illegal *per se*, these provisions of the *Criminal Code* render it relatively difficult, and at times unsafe, to engage in prostitution-related activities. Taken collectively, ss. 210, 212(1)(j) and 213(1)(c) restrict and/or outright deny access to a series of precautionary measures that would significantly improve the health and safety of sex workers. Accordingly, the appellants in *Bedford*, Teri Jean Bedford, Amy Lebovitch and Valerie Scott, three former or current sex workers, sought to have all three sections invalidated for their inconsistency with section 7 (the right to 'life, liberty and security').[57] They further argued that s. 213(1)(c) violated prostitutes' rights under section 2(b) (freedom of expression).[58]

[54] Powell 2013, 206.
[55] Galladin, Robertson and Wiseman 2011, 5.
[56] Kappel 2013, 411 & 415-16; Van der Meulen, Durisin and Love 2013, 15-6.
[57] Kappel 2013, 411 & 415-16.
[58] Hudson and Van der Meulen 2013, 116.

In the 1990 *Prostitution Reference*, the Supreme Court of Canada had previously addressed the issue of whether ss. 210 and 213(1)(c) of the *Criminal Code*, previously known as s. 193 and s. 195(1)(c), respectively, violated sections 2(b) and 7 of the *Charter.*[59] In light of the objectives of the provisions – in particular, government's interest in discouraging 'public nuisances' and in minimizing health/safety concerns associated with prostitution – the SCC determined that both provisions constituted a justifiable infringement on *Charter* rights.[60] Given the similarities between the *Prostitution Reference* and the constitutional challenge waged in *Bedford*, and given the principle of legal precedent, the claimants bore the onus of demonstrating that, "in light of new evidence and a material change in circumstances," the issue needed to be revisited by the courts.[61] To that effect, the claimants advanced two key arguments. First, that the prostitution reference exclusively addressed whether or not the provisions violated s. 7's right to 'life,' but did not consider whether they infringed the right to 'security.' They further argued that the issues raised in *Bedford* departed considerably from those addressed in the *Prostitution Reference*, thus warranting judicial intervention; in the former, the central issue was personal security, whereas in the latter, the issue centred on economic liberty.[62]

The Attorney General of Canada, who was joined by the Attorney General of Ontario,[63] advanced two arguments: (1) that there was no basis, "in law or new evidence," that justified the court's reevaluation and reconsideration of the constitutionality of the *Criminal Code* provisions; and (2) that the risks associated with prostitution stem directly from the sex trade (for example, third-party consumers), and are thus not directly caused by the *Criminal Code* prohibitions.[64] A number of groups, including the Real Women of Canada, the Catholic Civil Rights League and

[59] Powell 2013, 190.
[60] Hudson and Van der Meulen 2013, 133-34.
[61] Powell 2013, 190-91.
[62] Powell 2013, 201; Hudson and Van der Meulen 2013, 127.
[63] Kappel 2013, 412.
[64] Powell 2013, 191.

the Christian Fellowship, intervened on behalf of, and supported the arguments raised by, the Federal government.[65]

At the Ontario Superior Court, Justice Himel concluded that, in spite of the *Prostitution Reference*, it was appropriate to reconsider the constitutionality of ss. 210, 212(1)(j) and 213(1)(c) of the *Criminal Code*. Justice Himel argued that, prior to 1990, the doctrines of 'overbreadth', 'gross disproportionality' and 'arbitrariness' had not been developed in the s. 7 jurisprudence, and thus did not figure into the majority's analysis in the *Prostitution Reference*. Similarly, Justice Himel suggested that new empirical evidence had been made available in *Bedford*, which that had not previously been considered by the SCC. Lastly, she argued that the context of the *Charter* challenge in *Bedford* departed drastically from the issues raised in the *Prostitution Reference*, thus legitimizing judicial reevaluation.[66]

Justice Himel concluded that the provisions deprived the claimants of their right to security of the person, and did so in a manner that was inconsistent with the principles of fundamental justice: s. 210 was overbroad insofar as it was a 'blanket' prohibition on all 'in-call' sex work, further arguing that the government's objective of restricting public nuisances associated with prostitution was grossly disproportionate to the harms incurred by prostitutes; s. 212(1)(j) violated all three principles of fundamental justice by criminalizing the hiring of personnel, and by preventing sex workers from taking the necessary precautions to increase their personal safety; and finally, that s. 213(1)(c) was grossly disproportionate because it hindered prostitutes' ability to screen existing and potential clients. Justice Himel found that the provisions violated sections 2(b) and 7 of the *Charter*, and that the infringements were not justified under s. 1. She chose to remedy the violations by immediately invalidating sections

[65] Kappel 2013, 412.
[66] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 at para 17.

212(1)(j) and 213(1)(c), and by severing the word 'prostitution' from the definition provided in 197(1) (in relation to s. 210).[67]

The Attorney General of Canada appealed Justice Himel's decision based on the fact that the trial judge had not convincingly demonstrated why the evidence provided by the claimants was prioritized (or given greater weight) than that which was presented by government at trial. More importantly, they argued that prostitution laws, given the "complex, inconclusive, and value-laden nature of empirical evidence," is a policy area that should be debated in Parliament, and should thus be left to the discretion of elected representatives. The majority at the level of the Ontario Court of Appeal (OCA) refuted both arguments.[68]

In a 4:1 decision, the OCA found that, with respect to section 2(b), the trial judge was bound to the legal precedent established by the Supreme Court in the *Prostitution Reference*.[69] The majority on the Court of Appeal concluded, however, that the 'living on avails' and 'bawdy-house' provisions violated s. 7 *Charter* rights in a manner inconsistent with the principles of fundamental justice. While the OCA agreed with the lower court that the word 'prostitution' should be severed from s. 210, they opted to suspend this declaration for 12 months. Rather than invalidate section 212(1)(j), the majority on the Ontario Court of Appeal chose to 'read-in' the words "in circumstances of exploitation." With respect to s. 213(1)(c), the majority on the Court of Appeal found that while it engaged prostitutes' section 7 rights – namely, security of the person – it did so in a manner that was consistent with the principles of fundamental justice.[70]

The decision rendered by the OCA was challenged by the Attorney General of Canada on the grounds that ss. 210 and 212(1)(j) are constitutional, and by the respondents who cross-

[67] Ibid., at para 19-24.
[68] Hudson and Van der Meulen 2013, 132.
[69] Powell 2013, 195.
[70] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 at para 25-8.

appealed on the grounds that s. 213(1)(c) is unconstitutional, and that the remedy granted with respect to s. 210 was unjustified.[71] On October 25th, 2012, the Supreme Court officially granted both parties leave to appeal.[72]

3.5 The Supreme Court of Canada: *Canada (Attorney General) v. Bedford* [2013]

The Supreme Court of Canada delivered its unanimous decision in *Bedford*, authored by Chief Justice Beverly McLachlin, on December 20th, 2013. A total of 24 interveners appeared before the SCC, including: the Downtown Eastside Sex Workers United Against Violence Society, the Attorney General of Quebec, REAL Women of Canada, the Native Women's Association of Canada and the Catholic Civil Rights League.[73]

At trial, the Attorney General of Canada argued that the three prostitution-related sections of the *Criminal Code* were constitutional because the litigants had failed to demonstrate a "sufficient causal connection" between the prostitution laws and the harms incurred by sex workers. The federal government maintained that the safety and health risks faced by sex workers were attributable to prostitutes' personal choice to engage in prostitution and/or from interactions with third parties, such as individuals who purchase sex or pimps. They sought to demonstrate that the laws had not, in and of themselves, jeopardized the safety and health of prostitutes.[74] In response, McLachlin C.J. argued that street prostitutes – many of which suffer from substance abuse and/or mental illnesses, and who are habitually victims of poverty – "often have little choice but to sell their bodies for money." The Chief Justice went on to state that

[71] Ibid., at para 36.
[72] Kappel 2013, 414; Hudson and Van der Meulen 2013, 116.
[73] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101.
[74] Ibid., at para 73, 79 & 84.

while third parties are often the source of violence and abuse, the laws nonetheless increased, and contributed to, the safety risks associated with the sex trade.[75]

Having established that s. 7 rights had been engaged, the McLachlin Court went on to consider whether the three prostitution laws were consistent with the principles of fundamental justice. According to the Chief Justice, a successful s. 7 defence *exclusively* requires that the claimant(s) demonstrate that *their* life, liberty and/or security has been compromised/impaired as a result of the relevant law(s); such an approach solely considers, therefore, the effect of the law on limiting a single (perhaps even hypothetical) person's s.7 rights, as opposed to society more generally.[76]

The Court found that s. 210 (bawdy-houses) was grossly disproportionate to the objectives of the law – namely, minimizing public nuisances associated with prostitution – because it had the effect of preventing sex workers from accessing safety-enhancing measures. With respect to s. 212(1)(j), the 'living on avails' provision, the Supreme Court held that the law was overbroad insofar as it was a blanket prohibition that failed to adequately distinguish 'exploitive' from 'non-exploitive' relationships. In other words, s. 212(1)(j) had the effect of criminalizing the act of hiring staff, such as bodyguards, managers and receptionists, who, unlike pimps, would help mitigate the safety risks inherent in sex work. Lastly, the SCC found that s. 213(1)(c) had the "effect of displacing prostitutes to more secluded, less secure locations," and, as a result, was grossly disproportionate.[77]

In *Bedford*, the Court chose to remedy the constitutional defects by invalidating s. 210 (insofar as it relates to prostitution), and ss. 212(1)(j) and 213(1)(c). Consistent with the remedy granted by the trial judge, the Supreme Court went on to severe the word 'prostitution' from the

[75] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 at para 86-7, 89 & 93.
[76] Ibid., at para 123 & 127.
[77] Ibid., at para 136, 142 & 155.

definition of bawdyhouses under s. 197(1) as it applies to s. 210. Given the complex nature of prostitution laws, and the potential danger associated with leaving prostitution unregulated in Canada, however, the Court chose to suspend its decision for one year.[78]

Initially, it appears that, in suspending its declaration of invalidity, the Court acknowledged that the "legislature is a forum [better] structured for more expansive debate[s]."[79] Upon closer inspection, however, the Court's decision to suspend its declaration for twelve months can be perceived to be a relatively interventionist remedy. In effect, the Court in *Bedford* failed to explain their justification for issuing a twelve-month suspension, or their reasons for believing that a one-year suspension was ample time to address the issues raised by the Court in *Bedford*. In truth, the 'complex' and 'delicate' nature of prostitution reform required that the Court issue a longer suspension to provide the legislatures with the time necessary to craft an appropriate legislative response. It is highly plausible, therefore, that the twelve-month suspension granted was, in effect, "the Court subliminally [telling] the government that it did not expect nor desire significant change."[80] While McLachlin C.J. claimed that the Court's decision in *Bedford* did not prevent Parliament from introducing new legislation concerning "how and where prostitution may be conducted," it did forcefully assert, however, that the Court would not tolerate prostitution laws that, like those addressed in *Bedford*, would unreasonably infringe on prostitutes' right to security of the person.[81] As will be explored in the proceeding section, however, the Harper Conservatives responded to the Court's 'activist' decision in *Bedford* by introducing an equally strong legislative response via Bill C-36.

[78] Ibid., at para 164 &167-69.
[79] Mouland 2018, 298.
[80] Mouland 2018, 302-03.
[81] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 at para 165.

3.6 Bill C-36: The Harper Conservatives' Response to *Bedford*

On November 6th, 2014, the Conservative government chose to respond to *Bedford* via the introduction of Bill C-36 (Protection of Communities and Exploited Persons Act). This outcome, however, is not surprising. Following Himel J.'s decision on the Ontario Superior Court, Stephen Harper publicly stated his party's dissatisfaction with the outcome of the case. If need be, the Conservative government claimed that they were prepared to introduce a legislative response consistent with, and reflective of, their understanding of prostitution as being an inherently immoral activity.[82] It is important here to recall that, prior to the enactment of Bill C-36, prostitution was not in and of itself illegal. Indeed, the constitutional issues raised in *Bedford* centered on the issue of whether the three prostitution-related provisions deprived prostitutes of their right to security of the person under s.7 by heightening the risks and potential harms associated with the sex trade.

In *Bedford*, the Supreme Court claimed that s. 212(1)(j) was overbroad because it was essentially a blanket prohibition that captured both 'exploitative' and 'non-exploitative' relationships. To the extent that it prohibited sex workers from taking precautionary measures, such as the hiring of staff (bodyguards, receptionists and drivers), the Supreme Court held that the 'living on avails' law was unconstitutional.[83] Interestingly enough, s. 286.2(1) (the 'material benefit' provision) creates a brand new criminal offence whereby any person who "[knowingly] receives a financial or other material benefit" derived from the provision of sexual services can face up to a maximum of ten years in prison. Further, under s. 286.2(3), any person who "lives with or is habitually in the company of" sex workers is presumed to have 'profited' from the commercial sex trade; they are therefore also liable to imprisonment under s. 286.2(1), unless

[82] Lewis, Shaver and Maticka-Tyndale 2013, 202.
[83] Stewart 2016, 79.

they can adduce sufficient evidence that proves otherwise.[84] In effect, the 'material benefit' provision captures far more than simply 'exploitative' relationships, and, essentially, has the exact same effect as the 'living on avails' provision that had been struck down in *Bedford*. The bottom line is that sections 286.2(1) and (3) make it unlikely, perhaps even impossible, for sex workers to implement safety-enhancing measures; the mere possibility of criminal sanctions is sufficient to deter individuals from voluntarily working for, or being employed by, sex workers.[85]

Additionally, the Supreme Court in *Bedford* argued that the 'communication' provision (s. 213(1)(c)) was problematic to the extent that it prevented sex workers from screening clients, and because it forced sex workers to work in more isolated and unsafe areas.[86] In some respects, therefore, Bill C-36 complies with the Court's ruling. Section 213(1)(1.1), for example, restricts the conditions under which communicating "for the purpose of offering or providing sexual services" is prohibited. More specifically, prostitutes can now solicit sex in public locations, so long as it is does not occur in areas typically frequented by minors, such as parks, schools and/or daycares.[87] On the other hand, however, s. 213(1) effectively criminalizes the purchasing of sex in *all* public areas. Once again, the effect of the law is essentially the same as that which was struck down in *Bedford*. In prohibiting the purchasing of sex, the new law presumably forces prostitutes to work in more remote and dangerous places, creating conditions favorable to the expansion of underground commercial sex markets. Moreover, in carrying a penalty of up to five years in prison, the new law also has the effect of decreasing overall 'demand' for prostitution, which will undoubtedly also impair the economic livelihood of sex workers.[88]

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[84] Canada, Parliament, *House of Commons Debates*, 41st Parl, 2nd Sess, (6 November 2014).
[85] Stewart 2016, 79.
[86] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 at para 71 & 155.
[87] Davies 2015, 83; See also Stewart 2016, 79.
[88] Stewart 2016, 72.

Furthermore, by severing the word 'prostitution' from s. 197(1), it appears at first glance that Bill C-36 complies with the McLachlin Court's ruling in *Bedford*. The inclusion of sections 286.5(1) and (2), however, suggest otherwise. Under section 286.5(1), for example, sex workers *can* financially benefit from, or advertise on behalf of, "their own sexual services." Similarly, under section 286.5(2), sex workers cannot be charged with "aiding, abetting, conspiring or attempting" to commit a prostitution-related crime if it relates to the provision of their *own* sexual services.[89] While these provisions grant immunity to sex workers, it does so only in the context of their own work. They cannot, therefore, advertise on behalf of, or benefit from, another sex worker's sexual transactions. Thus, section 285.5(2) makes it illegal for sex workers to work out of the same location, to refer clients to their colleagues and finally, to monitor sexual interactions between other sex workers and their respective clients.[90] Recall that in *Bedford*, the Supreme Court accepted the trial judge's finding that bawdyhouses, in allowing sex workers to work out of the same location, would provide for safer working conditions.[91] Properly interpreted, however, the immunity provisions have the effect of exacerbating the safety and health risks associated with the sex trade, which seems to clearly be at odds with the spirit of the Supreme Court's ruling in *Bedford*.

Bedford represents one of the most activist Supreme Court decisions delivered by the McLachlin Court. On a number of occasions,[92] Chief Justice Beverly McLachlin, writing for a unanimous Court, expressed her intolerance for prostitution laws that would prevent sex workers from accessing safety-enhancing measures. In spite of this 'strong-form' decision invalidating three prostitution-related provisions of the *Criminal Code*, *Bedford* witnessed an equally, if not

[89] Canada, Parliament, *House of Commons Debates*, 41st Parl, 2nd Sess, (6 November 2014).
[90] Stewart 2016, 75.
[91] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 at para 134.
[92] Ibid., at para 63-4, 66-7, 71-2, 134-36, 139, 142 & 159.

stronger, legislative response. Three sections in Bill C-36 – namely, the 'material benefit', 'immunity' and 'communication' provisions – reintroduce, with some modifications, the provisions invalidated by the Supreme Court in *Bedford*.

This finding is not particularly surprising for two reasons. As previously stated, the Harper Conservatives had publicly expressed their dissatisfaction with the lower court rulings in *Bedford*. Bill C-36 provided them with the opportunity to vocalize this dissatisfaction.[93] Similarly, the Supreme Court of Canada's decision in *Bedford* was fundamentally at odds with the Harper Conservatives' 'tough-on-crime' approach. In this respect, Bill C-36 is consistent with Hall's theory of the Supreme Court of Canada as an 'implementer-dependent' institution. In this case, the Supreme Court's capacity to spearhead fundamental policy change was constrained by the Harper Conservatives' forceful disagreement with the Court's decision in *Bedford*. Bill C-36 is reflective of the Harper Conservatives' unwillingness to treat prostitution as a legitimate profession, their distaste for 'harm-reduction' approaches, and their intent to prevent the growth and flourishment of the sex industry in Canada. Most importantly, Bill C-36 reflects the Harper Conservatives' refusal to grant the SCC the power to make policy determinations with respect to salient issues of public policy.

3.7 Judicial Impact and the Harper Conservatives

In both *PHS Community* and *Bedford*, the Supreme Court delivered strong decisions. In the former, the Court sought to place constitutional limitations on how and when the Minister of Health could issue exemptions for safe injection facilities. In the latter, the McLachlin Court invalidated three prostitution-related provisions of the *Criminal Code*. In so doing, the SCC arguably sought to decriminalize and normalize drug use (*PHS Community*), and to liberalize

[93] Lewis, Shaver and Maticka-Tyndale 2013, 202.

prostitution laws and the commercial sex trade (*Bedford*). Undeniably, the Supreme Court attempted to judicialize criminal justice policy via its remedial activism. This becomes apparent when one considers the highly interventionist remedies applied by the Supreme Court, as well as the fact that the SCC delivered unanimous decisions.

Initially, a review of *PHS Community* and *Bedford* give the impression that the Court behaved as a powerful policymaking institution capable of launching fundamental policy reform. These significant *Charter* 'loses' thus appear to confirm right-wing judicial critics' assertion that the *Charter of Rights and Freedoms*, combined with the Court's activist approach to constitutional review, has resulted in the transfer of policymaking power from elected representatives to the judiciary. An analysis of the legislative sequels introduced by the Harper Conservatives in response to statutory invalidation, however, tells a different story.

In *The Hollow Hope*, Rosenberg (2008) argued that in order to behave as a powerful policymaking institution capable of social and political reform, final appellate courts "must have the ability to develop appropriate policies and the power to implement them."[94] As we have seen, the Supreme Court of Canada satisfies the first requirement. Undeniably, the McLachlin Court played a crucial policy role in *PHS Community* and *Bedford* as 'agenda-setters.' It did so by forcing policy issues – namely, safe injection facilities and prostitution reform – onto the federal legislative agenda, issues that may have never – under a different set of conditions – been debated in Parliament at that particular time. To some extent, therefore, the McLachlin Court functioned as a powerful policymaking institution.

The question remains, however, did the Supreme Court of Canada's decisions in *PHS Community* and *Bedford* result in fundamental policy change? In response to judicial invalidation, the federal legislature had two options at its disposal: comply with the Supreme

[94] Hall 2010, 15.

Court (negative dialogic response), or defy their ruling (positive dialogic response). As Hall (2010) suggests, unpopular lateral issues generally result in legislative noncompliance. *PHS Community* and *Bedford* attest to this claim. In particular, both cases centred on "policy issues of critical importance to the Harper government."[95] More importantly, the 'harm-reduction' approach adopted by the Supreme Court in both cases was fundamentally at odds with the Harper Conservatives' law and order agenda. It is not surprising, therefore, that in response to *PHS Community* and *Bedford*, the Conservative government introduced positive legislative responses that effectively reversed the judicial decisions.

Bill C-2, for example, introduced a series of twenty-six conditions that must be met before the Minister of Health can grant safe injection facilities exemptions under section 56 of the *CDSA*. Despite the Supreme Court's call to liberalize SIFs, not a single facility was granted an exemption, either by the Harper Conservatives, or the Trudeau Liberals, during the period in which Bill C-2 was in force. The same is not true of Bill C-37, however, which repealed and replaced Bill C-2. As this chapter has demonstrated, the Trudeau Liberals were more open to the idea of establishing safe injection facilities in an attempt to address the growing health and safety concerns associated with intravenous drug use in Canada. This is seen in the fact that, post-Bill C-37, over forty SIFs have been granted exemptions by the Minister of Health. Likewise, Bill C-36 effectively reintroduces the same prostitution-related provisions of the *Criminal Code* invalidated by the Supreme Court in *Bedford*. In effect, Bill C-36 goes one step further in now making it a crime to purchase sex, once again forcing sex workers to work in more dangerous and secluded areas.

Put simply, the Harper government chose to introduce legislative responses that explicitly defied the Court's decisions in *PHS Community* and *Bedford*, and which remained committed to

[95] Kelly (In progress), 6.

the original policy objectives of the statutes declared unconstitutional by the Court. Interestingly enough, it did so without resorting to the use of the notwithstanding clause. This demonstrates that judicial invalidation marks the beginning of a constitutional dialogue; the Court's invalidate, and the legislatures choose *when* and *how* to respond. However, Bill C-2 and C-36 also confirm that while "governments can lose the Charter 'battle,'" they can nonetheless "win the policy 'war.'"[96] While *Bedford* and *PHS Community* undeniably frustrated the Harper Conservatives' 'law and order' agenda, the Court's remedial activism was offset by the federal government's unwillingness to implement these strong-type judicial decisions. The crucial point here is that ordinary legislative majorities can, given the right set of conditions, reverse the potentially harmful effects of judicial invalidation.

Contrary to the position advanced by conservative critics, these cases demonstrate that "the judicialization of politics is derivative first and foremost of political, not judicial, factors."[97] Consistent with Hall's (2010) theory of the Supreme Court as an 'implementer-dependent' institution, Bill C-2 and C-36 demonstrate that positive legislative sequels can serve as a check on judicial supremacy. This remains true despite the Court's strong remedial powers under section 24(1) of the *Charter of Rights*. Through its remedial activism, the McLachlin Court demonstrated a clear intent to judicialize politics in *Bedford* and *PHS Community*. Nonetheless, in both cases, the policy impact of the Supreme Court was rather limited. The bottom line is that the Supreme Court of Canada lacks the enforcement mechanisms necessary to ensure compliance with their decisions. Under the Conservative government, little changed with respect to the number of safe injection facilities, and the overall safety of sex workers in Canada.

[96] Kelly (In progress), 31.
[97] Hirschl 2009, 270.

3.8 Conclusion

This chapter reviewed two cases involving salient issues of public policy, namely *Bedford* (prostitution reform) and *PHS Community* (safe injection facilities). In so doing, it has demonstrated that the McLachlin Court intended to judicialize criminal justice policy by invalidating three prostitution-related laws in *Bedford*, and by obliging the federal Minister of Health to order an immediate exemption to Insite in *PHS Community*. Both cases are key examples of judicial activism, and reflect the extent to which the McLachlin Court was prepared to dive into highly controversial and value-laden policy debates, despite the fact that there appeared to be no public consensus on how best to resolve these issues.

Drawing on dialogue theory, the chapter has argued that judicial invalidation often leaves room for an independent legislative response that 'reverses, modifies or avoids' a judicial decision.[98] While the Court advocated for 'harm-reduction' approaches to address the issues of safe injection facilities and prostitution reform, the Conservative government's reply legislation is reflective of their preference for 'crime-reduction' policies. Properly construed, Bill C-2 and C-36 can be classified as negative dialogic responses, or legislative noncompliance.

The chapter has attempted to demonstrate that conservative critics, in focusing exclusively on legal mobilization efforts, have overlooked the crucial role played by the legislatures as the designers and implementers of public policy in response to judicial invalidation. It has argued that right-wing critics wrongfully assume that because the Supreme Court is activist, that this results in fundamental public policy change. However, a review of *Bedford* and *PHS Community*, as well as their corresponding legislative responses, suggests that the policy influence of the McLachlin Court with respect to criminal justice policy was rather limited. In short, the McLachlin Court, despite its best efforts to "govern like

[98] Hogg, Bushell-Thornton and Wright 2007, 45.

parliamentarians,"[99] lacked the political support, or, alternatively, the implementation powers, necessary to enforce their decisions outside of the courtroom.

[99] Kelly and Manfredi 2009, 4.

4

The Judicialization of Healthcare Policy

The chapter focuses on two cases involving healthcare policy, including *Carter v. Canada (Attorney General)* and *Chaoulli v. Quebec (Attorney General)*. Additionally, the chapter reviews the Trudeau Liberals' response to *Carter* (An Act to amend the Criminal Code (Bill C-14)), and the Charest government's response to *Chaoulli* (An Act to amend the Act respecting health services and social services and other legislative provisions (Bill 33)).

In *Carter*, the Supreme Court unanimously struck down sections 14 (ban forbidding persons to consent to one's own death) and 241(b) (prohibition on 'aiding and abetting' another person to commit suicide) of the *Criminal Code* on the grounds that they denied competent and informed persons suffering from 'grievous and irremediable' medical conditions the right to physician-assisted death (PAD). In *Chaoulli*, a narrow majority (4:3) found that Quebec's ban on private health insurance violated section 1 of the Quebec *Charter of Human Rights* (the right to 'life, personal security, inviolability and freedom'). The majority maintained that greater privatization would remedy the long wait times experienced in the public healthcare sector.

Carter and *Chaoulli* are examples of 'strong' judicial decisions where the McLachlin Court invalidated primary legislation for its inconsistency with the Canadian and Quebec *Charters*, respectively. In both cases, the Court attempted to judicialize healthcare policy by transforming legal rights into health rights. Moreover, in *Carter*, the SCC delivered a unanimous decision authored by 'the Court,' signaling a clear policy preference for the legalization of PAD. While *Chaoulli* was a split decision, it also has 'strong-type' features. In particular, the majority found that the privatization ban violated the Quebec *Charter*, and not the Canadian one. This

decision may in large part be explained by the fact that the majority recognized that, in Quebec, where the Canadian *Charter of Rights* has never been popular, the judicial decision would have a greater degree of legitimacy and would therefore be complied with.[1]

Despite the McLachlin Court's attempt to judicialize healthcare policy, this chapter demonstrates that relatively little has changed with respect to access to physician-assisted death (post-*Carter*) and the public healthcare system in Quebec (post-*Chaoulli*). As the chapter illustrates, in cases involving lateral issues, the Supreme Court – as an 'implementer-dependent' institution – requires the support of the non-judicial actors responsible for accepting, and thus implementing, the Court's decision. When the Supreme Court delivers an unpopular judicial ruling that is perceived to be an unfavorable policy outcome by the actors responsible for implementation, the typical response will be noncompliance. This was the case in both *Carter* and *Chaoulli*.

Carter was unpopular with the Harper Conservatives, whereas the Trudeau Liberals appeared to be more open to the idea of legalizing physician-assisted death in Canada. The Conservatives' 'tough on crime' policy strategies attests to this claim.[2] In a public statement following *Carter*, however, the Trudeau government appeared to generally support the judicial decision: "The Supreme Court of Canada's decision to strike down the ban on physician-assisted death was unanimous and unambiguous: the current Criminal Code prohibition infringes on the Charter right to life, liberty and security of the person for adults who are mentally competent but suffering 'grievous and irremediable conditions.'"[3]

Broadly speaking, the chapter demonstrates that the Liberals complied with *Carter* insofar as Bill C-14 legalizes physician-assisted death for persons who are 'grievously and

[1] Bateman 2006, 321.
[2] Conservative Party of Canada 2011, 45 & 50.
[3] Dying with Dignity Canada, 2019.

irremediably' ill. Nonetheless, Bill C-14 can be properly classified as legislative noncompliance, as the eligibility criteria introduced by the federal government is far narrower than that which was preferred by the McLachlin Court. Bill C-14 requires that PAD patients' medical condition have progressed or deteriorated significantly, and that their natural death be 'reasonably foreseeable.'[4] These are two criteria that were not contemplated by the Court, and which arguably have the effect of narrowing the pool of applicants eligible for medial assistance in dying (MAID).

The most forceful opposition to MAID, however, has come from Canadian healthcare professionals who conscientiously object to PAD. As the chapter demonstrates, a majority of physicians and nurses across Canada refuse to assist their patients in prematurely terminating their lives, even in cases where the patient meets the eligibility criteria introduced in Bill C-14.[5]

As will be explored in the chapter, *Carter* dealt with a negative right, which simply requires that government abstain from interfering with a patient's decision to terminate their life. It did not, however, deal with a positive right. Stated differently, it did not require that the federal government, nor healthcare professionals, ensure access for persons who qualify. In short, *Carter* required the support of two non-judicial actors, neither of which fully complied with the Court's decision: the federal government, as the actor responsible for introducing reply legislation, and the College of Physicians and Surgeons in each province, as the private actors responsible for regulating the conduct of healthcare professionals.

Similarly, Bill 33 removes the complete ban on private health insurance in Quebec, and thus initially appears to comply with *Chaoulli*. However, it does so only in the context of three elective surgeries, namely hip, knee and cataract surgery. With the exception of these surgical

[4] Canada, Parliament, *House of Commons Debate*, 42nd Parl, 1st Sess, (17 June 2016).
[5] Ross and Sikkema 2016.

procedures, therefore, Bill 33 reintroduces a near complete ban on private health insurance, which had been struck down by the Court in *Chaoulli*. For this reason, it can be properly classified as legislative noncompliance.

The chapter will proceed in the following way. First, it provides an overview of *Carter*, including the facts of the case, the litigants involved and the outcome at trial. It then reviews the Supreme Court's decision. Next, it analyzes the Trudeau Liberals' response to *Carter*, Bill C-14. Having considered *Carter*, the chapter will review *Chaoulli*, which follows a similar pattern to that employed in the context of *Carter*. The chapter then summarizes both cases, and discusses the findings. This section attempts to understand the limits of judicial power and of the McLachlin Court's policy impact with respect to healthcare policy.

4.1 Overview of *Carter*

In 1972, the federal government decriminalized attempted suicide. However, physician-assisted death (PAD), sometimes referred to as medical assistance in dying (MAID), was prohibited under the *Criminal Code*. Under section 241(b), it was a criminal offence to "counsel, aid or abet" another person to commit suicide.[6] Similarly, under s. 14, it was illegal to 'consent' to one's own death.[7] As elsewhere, the prohibition on assisted death in Canada has historically been premised on strong religious and moral beliefs that suicide is a sin and should be condemned.[8]

In 1993, in *Rodriguez*, the Supreme Court was asked to determine whether sections 241(b) and 14 of the *Criminal Code* violated section 7 ('life, liberty and security'), 12 ('cruel and unusual punishment') and 15(1) (equality) *Charter* rights.[9] The claimant, Sue Rodriguez, was a

[6] Beschle 2013, 563.
[7] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 at para 19.
[8] Carter and Rodgerson 2018, 780.
[9] Chan and Somerville 2016, 150; *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 33 at para 5; Christie, Slain, Dahlgren and Koning 2016, 2.

forty-two year old woman who had been diagnosed with Amyotrophic Lateral Sclerosis (ALS), a neurodegenerative disease with no known cure,[10] and was given a maximum life expectancy of fourteen months. As her condition worsened, Rodriguez would eventually become fully paralyzed, thus losing her ability to carry out day-to-day functions without assistance, such as eating, bathing and walking. Rodriguez challenged the constitutionality of sections 14 and 241(b) on the grounds that it denied her the right to bodily integrity.[11] In a 5:4 decision, the majority on the Court found that while s. 241(b) engaged section 7 rights, it did so in a manner that was consistent with the principles of fundamental justice. Writing for the majority, Justice Sopinka found that the law's objective – namely, to protect 'vulnerable' individuals from being coerced into prematurely terminating their life, and to preserve the 'sanctity of life' – justified the *Charter* violation.[12]

In 2008, following a number of failed legislative attempts to decriminalize PAD,[13] Kathleen Carter, a woman suffering from spinal stenosis, sought access to physician-assisted death. Lee Carter and Hollis Johnson, the co-plaintiffs in *Carter*, traveled to a physician-assisted suicide clinic in Switzerland (DIGNITAS) where, upon her request, Mrs. Carter was prescribed sodium pentobarbital and soon after passed away.[14] Against this backdrop, Gloria Taylor, a woman who like Rodriguez suffered from ALS, expressed her desire to "die peacefully" with the help of a trained medical professional at the time and place of her choosing.[15] Accordingly, the plaintiffs sought to have s. 241(b) and 14 of the *Criminal Code* invalidated for their inconsistency with s. 7 and s. 15 of the *Charter*.[16]

[10] Carter and Rodgerson 2018, 778; Baum 2015, 157.
[11] Beschle 2013, 562-63; Baum 2015, 159.
[12] Chan and Somerville 2016, 150; Beschle 2013, 563-64; Baum 2015, 173.
[13] Carter and Rodgerson 2018, 785.
[14] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 at para 17.
[15] Ibid., at para 12.
[16] Chan and Somerville 2016, 145 & 150.

Given the similarities between *Rodriguez* and *Carter*, and given the principle of *stare decisis*, the plaintiffs needed to make a compelling case for why the courts should revisit the issue. When the SCC delivered its judgment in *Rodriguez*, no Western democracy had previously legalized physician-assisted suicide (PAS). This was a crucial reason underpinning the majority's decision to uphold s. 241(b).[17] Over the next twenty years, however, a number of jurisdictions decriminalized and/or legalized this medical practice, including two American states and a number of European countries.[18] Factoring into the trial judge's decision to reconsider the issue was also the fact that the 'social landscape' surrounding physician-assisted death had changed since *Rodriguez*, and because the s. 7 jurisprudence had considerably evolved.[19]

In *Carter*, the plaintiffs argued that the prohibition on physician-assisted death in Canada was fundamentally incompatible with the right to bodily autonomy and self-determination. For advocates of PAD, section 241(b) prevents 'empathetic' medical professionals from assisting 'rational' and 'informed' patients in ending their life. Alternatively, the Attorney General of Canada framed 'PAD patients' as individuals suffering from depression and/or mental illnesses. The federal government, and the Attorney General of British Columbia, argued that patients' mental instability clouded their judgment, and led them to make irrational choices with respect to their bodies and lives. Moreover, the federal government argued that the legalization of PAD would result in a "concomitant reduction in the quality of palliative care" in Canada.[20]

Justice Smith of the British Columbia Supreme Court rejected both arguments raised by government. Drawing on the experiences of permissive jurisdictions, she found that the Netherlands and Oregon had implemented safeguards "design[ed] to protect the socially

[17] Baum 2015, 174; Beschle 2013, 564; Christie et al. 2016, 3.
[18] Beschle 2013, 561; See also Karsoho, Wright, Macdonald and Fishman 2016, 2-3; See also Chan and Somerville 2016, 147.
[19] Rahimi 2017, 459-60.
[20] Karsoho et. al 2016, 6-8.

vulnerable," and that such precautionary measures had drastically decreased the incidence of abuse.[21] Smith J. found that the prohibition on physician-assisted death did not minimally impair on equality rights because it forced disabled persons to resort to inhumane ways of ending their lives, such as through starvation and dehydration tactics.[22] The trial judge argued that s. 241(b) infringed the right to 'life' under s. 7 of the *Charter* because it pressurized "competent, informed, grievously and irremediably ill" persons into prematurely ending their lives out of fear that they would not physically be able to do so at a later date.[23] Smith J. suspended her declaration of invalidity for one year, and granted Gloria Taylor a constitutional exemption in the interim.[24]

The federal government appealed the decision to the British Columbia Court of Appeal (BCCA). They argued that the "trial judge made a palpable and overriding error in concluding that the safeguards would minimize the risk associated with assisted dying."[25] Their claim drew heavily on Professor Montero's assertion that the legalization of PAD in Belgium, in spite of the safeguards established to protect persons from involuntarily consenting, created a 'slippery slope' effect. As a result, the federal government maintained that a complete prohibition on PAD was necessary.[26] In a 2:1 decision, the BCCA found that the trial judge was bound by the decision delivered by the Court in *Rodriguez* and, consequently, reversed the trial judge's decision.[27] The claimants later appealed the BCCA's decision to the Supreme Court of Canada.

[21] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 at para 25 & 27.
[22] Ibid., at para. 29.
[23] Ibid., at para 24 & 30.
[24] Ibid., at para 32.
[25] Ibid., at para 108.
[26] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 at para 111 & 114
[27] Ibid., at para 34; Rahimi 2017, 459; Chan and Somerville 2016, 147

4.2 The Supreme Court of Canada: *Carter v. Canada (Attorney General)* [2015]

On February 6th, 2015, the Supreme Court of Canada delivered its much-anticipated decision in *Carter*. In a unanimous decision authored by 'The Court,' the SCC argued that the trial judge did not err in revisiting the debate on physician-assisted suicide in Canada. According to the Court, the s. 7 jurisprudence had evolved significantly since *Rodriguez*; the principles of overbreadth and gross disproportionately did not factor into the Court's analysis in 1993. Moreover, the SCC argued that new evidence had surfaced which had not been available in *Rodriguez*, and that the social landscape with respect to PAD had significantly changed over the last twenty years.[28]

Having established that a 'material change' in circumstances warranted judicial reevaluation, the Supreme Court considered whether ss. 241(b) and 14 violated s. 7 rights. According to the Court, the prohibition on physician-assisted death engaged both liberty and security of the person (s. 7) because it denied persons suffering from "grievous and irremediable medical condition[s]" the right to make fundamental choices with respect to their life and death, and because it unnecessarily prolonged patients' psychological and physical suffering.[29]

In its section 1 analysis that involved the reasonableness of the rights engagement, the Court found that the *Criminal Code* provisions did not minimally impair on section 7 rights. In their opinion, the federal government had not convincingly demonstrated why a complete prohibition, as opposed to a 'well-tailored' system with adequate safeguards, was necessary.[30] Insofar as sections 241(b) and 14 denied "competent adult person[s]" who "clearly consent to the termination of life" and who suffer from "grievous irremediable condition[s] that causes enduring suffering" the right to physician-assisted death, the McLachlin Court found that the

[28] Ibid., at para 44-7.
[29] Ibid., at para 63 & 66.
[30] Ibid., at para 117-19 & 121.

provisions unjustifiably infringed on s. 7.[31] As a result, the Court declared ss. 241(b) and 14 to be unconstitutional. They suspended their declaration of invalidity for 12 months.[32]

In 2016, the Supreme Court extended its suspended declaration for an additional four months. The Court was rather silent, however, on the reasons justifying their decision for doing so.[33] A compelling case could be made that they should have allotted the federal government the requested time (6 months), especially given that an intervening election was held, and a new government had come to power, the same year that they had delivered their judgment in *Carter*. In so doing, the SCC would have provided the Trudeau Liberals with sufficient time to craft an appropriate legislative response to address the constitutional issues raised in *Carter*.[34]

There are at least four other features of *Carter* that stand out as particularly 'activist.' First, the Court artificially narrowed the objectives of the impugned provisions to ensure a favorable outcome.[35] At trial, the federal government asserted that the prohibition on PAD had a dual purpose, namely to protect the vulnerable and to preserve the sanctity of life.[36] In *Carter*, the Court forcefully disagreed: "The object of the prohibition is not, broadly, to preserve life whatever circumstances, but more specifically to protect vulnerable persons from being induced to commit suicide at a time of weakness."[37] Recall that a law is overbroad if it *captures more than is necessary* to achieve its desired objective. Arguably, the Supreme Court recognized that in narrowing the law's objective, it would render it "more susceptible to being struck down as overbroad," as the prohibition on physician-assisted suicide would capture both 'vulnerable' and

[31] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 at para 127.
[32] Ibid., at para 127-28.
[33] Ibid., at para 6.
[34] Macfarlane 2016, 109.
[35] Chan and Somerville 2016, 167.
[36] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 at para 75.
[37]Ibid., at case summary.

'non-vulnerable' persons.[38] By depriving the 'non-vulnerable' (rational and informed adults who voluntarily consent) the right to PAD, the law would likely violate s. 7. The McLachlin Court themselves recognized that, had they accepted that the law's objective was to 'protect the sanctity of life,' it would have been extremely difficult to demonstrate "that the means used to further [the law were] overbroad or grossly disproportionate."[39]

Additionally, the remedy issued by the SCC was overly prescriptive; it not only told the federal government what they *could not do*, it also told them what they *must do*. In *Carter*, the Supreme Court advocated for an approach that placed very few restrictions on physician-assisted death in Canada. If adults voluntarily consent, and if they suffer from 'irremediable' disabilities, then they are entitled to a *de facto* constitutional right to PAD. The truth of the matter is that the Court could have chosen to simply invalidate the provisions. Arguably, this is what they should have done given that *Carter* dealt with a controversial issue of healthcare policy for which the Court lacks institutional capacity.[40] In being overly prescriptive, the McLachlin Court conveyed a very specific message: the SCC had no desire to grant Parliament the opportunity to introduce an independent legislative sequel. Indeed, in their concluding remarks, the Court explained that while the federal government could introduce a legislative response to address judicial invalidation, it had to do so in a way that was "consistent with the constitutional parameters" established by the Court in *Carter*.[41]

Moreover, in *Carter*, the Supreme Court was asked to determine whether the *Criminal Code* provisions violated section 7 *Charter* rights. Properly interpreted, the right to 'life, liberty and security' of the person is a legal right. Over the course of the *Charter*'s lifespan, however,

[38] Chan and Somerville 2016, 165.
[39] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 at para 77.
[40] Rahimi 2017, 484-86.
[41] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 at para 126.

the Supreme Court has interpreted section 7 legal rights to also include non-legal rights issues, thus expanding the policy areas that can potentially fall victim to judicial invalidation.[42] In *Carter*, the McLachlin Court transformed legal rights into health rights. It did so by finding that Canadians suffering from 'grievous and irremediable' medical conditions could not be deprived of their right to terminate their life. Essentially, it was the Court's broad interpretation of section 7 which resulted in the invalidation of the *Criminal Code* provisions, not the wording of section 7 *per se*.

It is also important to reiterate that in *Carter*, the SCC delivered a unanimous decision authored by 'The Court' on an inherently divisive issue. Cases involving controversial and salient issues of public policy rarely witness unanimous judgments because they "often do not admit a simple 'right answer.'"[43] Recall that in *Rodriguez*, a narrow majority on the Court found that the prohibition on physician-assisted death was a justifiable infringement on *Charter* rights. Yet, in *Carter*, a unanimous Court struck down the very same provisions. This finding, however, is not shocking for a number of reasons. First, Justice McLachlin, as she was then, dissented from the majority in *Rodriguez*. Further, since *Rodriguez*, the Court has experienced a considerable degree of turnover; with the sole exception of McLachlin C.J., none of the other Supreme Court justices in *Carter* were members of the bench in *Rodriguez*. Perhaps more importantly, Beverly McLachlin had, since *Rodriguez*, been appointed as Chief Justice. Arguably, McLachlin C.J., now in a position of influence and authority, sought to avoid the legal uncertainties that marked the Court's split decision in *Rodriguez*. Unlike *Rodriguez*, the Court's message in *Carter* was clear: their decision is "final, authoritative, and without ambiguity."[44]

[42] Macfarlane 2014, 54.
[43] Mathen 2003, 332.
[44] Kelly (In progress), 18.

As will be explored in the next section, the Trudeau Liberals responded to *Carter* by introducing Bill C-14, 'An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying).' While Bill C-14 complied in some respects with the Court's decision in *Carter*, the eligibility criteria introduced by the Trudeau Liberals suggests that the federal government preferred a much more restrictive policy approach to physician-assisted death than that which was advanced by the McLachlin Court.

4.3 Bill C-14: The Trudeau Liberals' Response to *Carter*

June 17th, 2016, the Trudeau Liberals introduced Bill C-14. Section 241.2(1) of Bill C-14 lists a number of criteria that must be met before a person is eligible to receive medical assistance in dying. Persons qualify for physician-assisted death if they are a competent adult aged 18 or more (subsection b) who suffers from a 'grievous and irremediable' medical condition (subsection c) and who voluntarily requests and consents to prematurely terminating their life (subsections d and e).[45] In this respect, Bill C-14 copied nearly verbatim the Court's suggestions in *Carter*.[46] In other respects, however, Bill C-14 goes far beyond the Supreme Court's guidelines. For example, to be eligible for MAID, a person suffering from a 'grievous and irremediable' condition must also be in "an advanced state of irreversible decline in capability," and is required to demonstrate that their natural death is "reasonably foreseeable." Section 241.2(3) further states that patients must wait ten days after having signed the consent form, and that two healthcare professionals must certify that the patient meets the requirements for PAD.[47]

In *Carter*, the Court made no mention of these requirements. Rather, the Supreme Court argued that it was unconstitutional to deny competent and informed persons who have been

[45] Canada, Parliament, *House of Commons Debate*, 42nd Parl, 1st Sess, (17 June 2016).
[46] Hennigar and Nicolaides 2018, 319.
[47] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 at para 127.

diagnosed with an irremediable medical condition and who, as a result of this condition, experience 'intolerable' and 'enduring' psychological and/or physical suffering, access to MAID.[48] Bill C-14, therefore, has the effect of denying persons who would have qualified for physician-assisted death had the Trudeau Liberals fully complied with the Court. In fact, there is some evidence to suggest that the 'reasonably foreseeable' requirement is an effective barrier to physician-assisted death in Canada. Reports suggest that out of 1,066 requests across several provinces, including Quebec, Saskatchewan, Manitoba, Alberta and some Atlantic provinces, eight per cent of applications were dismissed on the grounds that the applicant did not suffer from a terminal illness. An additional fourteen per cent of these applications were unsuccessful because the patients had died prior to being granted access, which could in part be "attributed to requests being made at a late stage in an individual's illness."[49]

This finding clearly illustrates the paradox of Bill C-14. While it legalizes physician-assisted death, it requires that applicants be in the final stages of their lives. This not only prolongs their psychological and physical suffering, which was the primary reason why the Court struck down sections 241(b) and 14, but it also runs the risk that patients will die before they are given the chance to make fundamental determinations with respect to their bodies and lives. For example, Julia Lamb, a twenty-five-year-old woman suffering from spinal muscular atrophy, has recently waged a constitutional challenge on the basis that the 'reasonably foreseeable' criterion is unconstitutional. Lamb maintains that the new *Criminal Code* provisions deprive her of her constitutional right, as per the Court's decision in *Carter*, to medical assistance in dying because her doctors cannot predict with sufficient certainty that her natural death is imminent.[50]

[48] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 at para 127.
[49] Health Canada 2018.
[50] Sigalet and Baron 2016; Downie 2017, 139.

In 2019, a similar case arose in Quebec where two plaintiffs, John Truchon and Nicole Gladu, both suffering from grievous and irremediable (but non-terminal) medical conditions causing enduring psychological and physical pain, yet each denied their application for access to MAID, claimed that the 'reasonably foreseeable' requirement introduced by the Trudeau Liberals was unconstitutional.[51] They maintained that Bill C-14, by rendering patients ineligible for medical assistance in dying simply on the basis that they did not suffer from terminal illnesses, was tantamount to an absolute prohibition: "[Les demandeurs] soutiennent que l'exigence d'une morte naturelle raisonnablement prévisible crée l'équivalent d'une prohibition à l'aide médicale à mourir pour toutes les personnes qui, comme eux, ne sont pas en fin de vie."[52] Ruling in favor of the plaintiffs, the trial judge, Justice Baudouin, found that the 'reasonable foreseeable' requirement reintroduced a near complete prohibition on medical assistance in dying in Canada, which had been declared unconstitutional by the Supreme Court in *Carter*. Baudouin J. maintained that, in including the 'reasonably foreseeable' requirement, government recognized that countless suffering patients would be deemed ineligible, and would therefore be denied their constitutional right to a 'serene' and 'dignified' death.[53] Accordingly, she invalidated s. 241.2(2)(d) of Bill C-14, but suspended her decision for six months in an attempt to provide government with the necessary time to craft an appropriate legislative response.[54]

Following the implementation of Bill C-14, a number of other groups, including MAID advocates, healthcare professionals and patients, criticized the Trudeau Liberals for failing to comply with the constitutional parameters established by the McLachlin Court in *Carter*. They were of the view that eligibility for physician-assisted death should be based primarily on the

[51] Global News. 2019.
[52] *Truchon c. Procureur general du Canada*, [2019] QCCS 3792 at para 517.
[53] *Truchon c. Procureur general du Canada*, [2019] QCCS 3792 at para 622 & 633.
[54]Downie and Gilbert 2019.

extent of the patient's psychological and physical suffering, rather than the stage of one's illness. Even the Canadian Senate opposed Bill C-14. They too found that the 'reasonably foreseeable' requirement was too restrictive, and would likely be found to be in violation of the *Charter of Rights and Freedoms*.[55]

Others have taken extreme measures to ensure their eligibility for medical assistance in dying. In 2016, shortly after Bill C-14 came into force, Jean Brault, a man suffering from a 'grievous and irremediable' medical condition, voiced his dissatisfaction by launching a hunger strike, which consisted of him refusing to eat for fifty-three consecutive days or drink water for seven days. Brault's choice to dehydrate and starve himself was a desperate attempt to meet the 'reasonably foreseeable' criteria necessary to qualify for physician-assisted death.[56] This once again illustrates the controversy surrounding Bill C-14. By requiring that patients be at the end of their life, there is a greater risk that ineligible persons will intentionally self-inflict harm to ensure that they meet the requirements necessary to exercise their right to PAD.

Undeniably, Bill C-14 adopts a more restrictive regulatory scheme that that which was envisioned by the Court in *Carter*. Bill C-14, however, is by no means the only barrier to the effective implementation of physician-assisted death in Canada. In *Carter*, the Court maintained that judicial invalidation of the *Criminal Code* prohibitions would not "compel physicians to provide assistance in dying."[57] In other words, *Carter* dealt with a negative right (the right not to have government deny persons of their right to seek medical assistance in dying), not a positive right (the right to access or receive medical assistance in dying). This once again illustrates the limitations of legal mobilization efforts and of the *Charter of Rights and Freedoms*.

[55] Downie and Gilbert 2019.
[56] McKenna 2016.
[57] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 at para 132.

By its very nature, the legalization of PAD requires that trained healthcare professionals be willing to provide these services. Strong moral, ethical and/or religious values premised on beliefs that killing and/or suicide are intrinsically wrong could in practice constitute an additional barrier for access to physician-assisted death. Generally speaking, all of the provincial physicians associations have maintained that healthcare professionals who conscientiously object to the provision of MAID are not required to provide these services. All of the provinces, however, require that non-participating doctors refer their patients to participating doctors, or, in some cases, that they provide their patient with the appropriate information and/or resources necessary to exercise this right. Nonetheless, doctors *cannot be compelled* to provide these services.

A recent report published by the Canadian Medical Association suggests that a majority of healthcare professionals (roughly 63 per cent) conscientiously object to PAD, even in cases where patients meet the relatively strict eligibility requirements of Bill C-14. Overall, physicians have maintained that there are fundamental differences between withdrawing medically necessary services and euthanasia, and have expressed greater reservation with respect to the latter. [58] Thus, even with referrals, it may be difficult to find physicians willing to assist patients. The final outcome is that, while patients who are 'grievously and irremediably' ill are technically eligible for medical assistance in dying, relatively few will actually have access to these services.

The truth of the matter is that a right bodily autonomy and physician-assisted death are not synonymous with a duty to 'mandate' or ensure access to PAD. [59] *Carter* dealt with a negative right, and did not require that the federal government, nor healthcare professionals, provide access to such services. Therein lie the limitations of legal mobilization and of the Supreme Court's policymaking capacity. As an 'implementer-dependent' institution that lacks

[58] Ross and Sikkema 2016.
[59] Ross and Sikkema 2016.

the resources required to enforce their decisions outside of the courtroom, the Supreme Court requires that the actors responsible for implementation – in this case, the federal government and healthcare professionals, more generally – implement their ruling. When the Supreme Court delivers unpopular rulings involving lateral issues, therefore, their policymaking power can be tempered via noncompliance on the part of these non-judicial actors, as evidenced post-*Carter*.

As the proceeding analysis has demonstrated, the federal government complied with a number of elements of the Court's decision in *Carter*. To some extent, this was to be expected. In their 2015 campaign platform, 'Real Change: A New Plan For A Strong Middle Class,' the Trudeau Liberals committed themselves to "restor[ing] dignity and respect to the relationship between government and the Supreme Court."[60] To a certain degree, therefore, the new federal government appeared to be much more 'Court friendly' than their predecessors, and thus more likely to accept judicial decisions as being authoritative and binding on government. For this reason, it is not wholly shocking that physician-assisted death is now legalized in Canada. Nonetheless, Bill C-14 also has features of legislative noncompliance, suggesting that the Trudeau Liberals preferred a much more restrictive and tailored approach to PAD than that which was envisioned by the McLachlin Court. This is evidenced by the fact that patients who, like Lamb, Truchon and Gladu, suffer from 'grievous and irremediable' medical conditions, are not eligible under Bill C-14, but would have likely been eligible had the Liberal government fully complied.

As we have seen, however, *Carter* required the compliance of two non-judicial actors, the federal government and provincial medical associations. This is because, under the division of powers, the federal legislature is tasked with "develop[ing] appropriate eligibility criteria and safeguards while provinces and territories are responsible for specific policies pertaining to

[60] Liberal Party of Canada 2015.

administration of health services."[61] As we have seen, the most forceful opposition to PAD has come from physicians across Canada who have reserved their right to opt out of providing these services, which has evidently had a negative impact on access to physician-assisted death in Canada. As of this writing, there exists no conclusive or comprehensive data on the total number of physicians who conscientiously object to PAD. The available evidence does suggest, however, that non-participating healthcare professionals may pose an additional barrier to the effective implementation of the Supreme Court's decision in *Carter*.

What this implies, therefore, is that judicial invalidation of the *Criminal Code* provisions on medical assistance in dying did not result in fundamental policy change. Undoubtedly, the Supreme Court behaved as a powerful policymaking institution as 'agenda-setters.' This is because, through their remedial activism, the McLachlin Court was able to force the federal government to reconsider Canada's prohibition on physician-assisted death. The Court's remedial activism alone, however, is not sufficient to ensure that non-judicial actors comply with the judicial decision. The Trudeau Liberals (at least in part), and the College of Physicians and Surgeons in each province, did not fully accept, and thus did not fully comply with, *Carter*. Despite its attempts to judicialize healthcare policy, the McLachlin Court's policy impact, therefore, was rather limited. In fact, while MAID is technically legal in Canada as a result of Bill C-14, noncompliance on the part of healthcare professionals in Canada has the same effect as if it were still criminalized. This is because "the detrimental impact of a lack of access on rights-holders that flows from provincial inaction will be functionally equivalent to the harms associated with restrictions or prohibitions under criminal law."[62]

[61] Carter, Rogerson and Grace 2018, 56-7.
[62] Macfarlane 2016, 121.

Having considered the Supreme Court's decision in *Carter* and the Trudeau Liberals' response, the next section addresses *Chaoulli*. It will first provide an overview of the public healthcare system in Canada and in Quebec before addressing the facts of the case.

4.4 Overview of *Chaoulli*

The *Canada Health Act* (*CHA*) "supports single-tier universal health coverage."[63] Accordingly, in order to be eligible for federal funding under the *CHA*, provincial governments have introduced a series of laws that: (1) ban extra billing for necessary health services/procedures (charging patients an additional amount which is not paid by government); (2) prohibit healthcare professionals who have 'opted-out' of the public system from charging government for medical services rendered; and (3) ban Canadians from purchasing private health insurance for medical services which are already offered in the public system.[64]

These restrictions have sparked a lively debate between those who favor a single-tier system, and those preferring privatization. Medicare advocates often argue that the prohibition on private health insurance is necessary in order to ensure that medical services are provided based on need, rather than one's ability to pay. In their opinion, greater privatization would deprive the public system of the human and financial resources required to provide adequate and efficient medical services to Canadians who cannot afford health insurance. The restrictions on privatization in Canada suggest that the federal and provincial governments have, generally speaking, always preferred a 'single-tier' public system.[65] On the other hand, pro-privatization advocates have long pushed for a 'two-tier' system in Canada. In particular, they have drawn on

[63] Flood and Thomas 2018, 435.
[64] Flood and Thomas 2018, 435.
[65] Marchildon 2005, 50; Yeo and Lucock 2006, 144.

the experiences of other countries with 'hybrid' systems to argue that greater privatization would not undermine the public system.[66]

The privatization debate became especially heated in the mid-1990s when Canada entered into a recession that had a lasting negative impact on its healthcare landscape.[67] Federal cutbacks had been made with respect to healthcare transfers in an attempt to eliminate budget deficits; provincial governments experienced similar debt problems. As a result, hospitals across the country were closing their doors at an unprecedented rate, thus causing lengthy wait times in the public system. Canada's economic state during this time served as the impetus driving calls to reform Canada's single-tier healthcare system. In particular, physicians insisted that greater privatization would help alleviate the problem of long wait times. [68]

Two provisions prohibit private health insurance in Quebec: section 15 of the *Health Insurance Act* and section 11 of the *Hospital Insurance Act*. The former prohibits private insurance companies from covering medically-necessary services provided for by the public system, while the latter prohibits healthcare professionals who have 'opted-out' of the public system from "contracting for services in publicly-funded hospitals."[69] In 1997, the two plaintiffs in *Chaoulli*, George Zeliotis and Jacques Chaoulli, sought to have both provisions invalidated on the basis that they unjustifiably infringed section 7 *Charter* rights, or, alternatively, that they violated section 1 of the Quebec *Charter of Human Rights and Freedoms*.[70]

George Zeliotis, a sixty-one year old man with a series of health conditions, required hip replacement surgery. While awaiting surgery, Zeliotis discovered that Quebec's healthcare policy prevented him from obtaining private health insurance to cover his medical expenses for

[66] Flood and Thomas 2018, 437.
[67] Flood 2008, 229.
[68] Flood and Thomas 2018, 435.
[69] Manfredi and Maioni 2006, 255.
[70] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at para 2-3.

services already offered and covered in the public system. Zeliotis was also prevented from paying participating surgeons directly for healthcare services provided in a public facility.[71] Consequently, he argued that the long wait times in Quebec denied him of his right to receive medical care in a timely fashion.[72] Jacques Chaoulli, however, was a medical practitioner who 'opted-out' of the public healthcare system, but soon after returned as a general practitioner in a walk-in clinic. This decision was in large part based off of the fact that, in Quebec, "the disincentives for opting out of the system are very high;" without access to private health insurance, relatively few will have the financial means to pay directly for medical services.[73] Although Chaoulli was not Zeliotis' physician, they 'joined forces' in *Chaoulli*.[74]

At trial, the Quebec government argued that a hybrid healthcare regime would result in the transfer of human and financial resources from the public to the private system – resources that were necessary to maintain universal healthcare coverage in Quebec. Not only would the public healthcare system suffer as a result, but it would also deprive those unable to purchase private health insurance from receiving the medical attention they are entitled to. Conversely, the plaintiffs maintained that greater privatization would drastically reduce long wait times for medically-necessary services. After reviewing expert testimonies of a number of healthcare professionals, the trial judge, Justice Piché, found that the prohibition on private health insurance in Quebec "was necessary to protect the integrity and viability of the public health system."[75] While recognizing that wait times were problematic, she nonetheless concluded that the

[71] Manfredi 2014, 141.
[72] Yeo and Lucock 2006, 133.
[73] Manfredi 2014, 141-42.
[74] Manfredi and Maioni 2018, 94; Manfredi 2014, 142.
[75] Jackman 2006, 354-55; See also *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at para 135.

prohibition did not violate section 7 *Charter* rights,[76] or s. 1 of the Quebec *Charter* (the right to 'life, personal security, inviolability and freedom').[77]

The claimants appealed the decision to the Quebec Court of Appeal. In a unanimous decision, they upheld the judgment rendered at the Quebec Superior Court.[78] The decision was further appealed to the Supreme Court of Canada, which was granted by the Court in May 2003.[79]

While the *Charter* challenge originated in Quebec, by the time it reached the Supreme Court, a number of other provinces, including Manitoba, British Columbia and Ontario, intervened on behalf of the Quebec government.[80] Additionally, by the time the case made its way to the Supreme Court of Canada, two reports were published – the Romanow and Kirby reports. The Romanow Report, which emerged out of a Royal Commission on the Future of Health Care in Canada, maintained that a 'single-tier' healthcare system was necessary in order to prevent human and financial resources from being redirected from the public to the private market.[81] This claim appears to echo the arguments advanced by the Quebec government in *Chaoulli*. Alternatively, the Kirby Report, which originated in the Senate, maintained that greater privatization would not deprive the public system of its resources, nor would the public system suffer as a result of greater privatization.[82] This finding seems to support the arguments raised by the claimants. These reports were published in 2002 and, accordingly, *only* factored into the Supreme Court's decision.[83]

[76] Manfredi and Maioni 2018, 97-8.
[77] Jackman 2006, 358.
[78] Premont 2007, 58; Jackman 2006, 356.
[79] Manfredi and Maioni 2018, 100; Manfredi 2014, 142.
[80] Manfredi and Maioni 2006, 261; Manfredi and Maioni 2018, 100.
[81] Premont 2007, 63-4.
[82] Premont 2007, 64.
[83] Manfredi 2014, 154.

4.5 The Majority on the Supreme Court of Canada: *Chaoulli v. Quebec (Attorney General)* [2005]

On June 9th, 2005, the Supreme Court of Canada delivered its decision in *Chaoulli*. Unlike *Carter*, *Chaoulli* was a split decision (4:3). Accordingly, the section will first review the majority's decision, followed by an overview of the minority's opinion. Importantly, the majority in *Chaoulli* found that the prohibition on private health insurance in Quebec violated section 1 of the Quebec *Charter*. The Court, however, was evenly split (3:3) on the issue of whether the provisions violated the Canadian *Charter*. Thus, the Court's "decision did not have immediate legal impact outside of Quebec."[84] Nonetheless, the fact that *Chaoulli* attracted the attention of countless other provinces suggests that Quebec was by no means the only province with a direct interest in the outcome at trial. [85] An unfavorable outcome would likely force other provinces to modify their healthcare policy given that, in the event that similar cases arise in the context of other provinces, it is likely that the Court would also find that similar prohibitions on private health insurance violated their respective provincial human rights codes.

In *Chaoulli*, Justice Deschamps found that section 15 of the *Health Insurance Act* and section 11 of the *Hospital Insurance Act* engaged both section 7 of the Canadian *Charter* (the right to 'life, liberty and security') and section 1 of the Quebec *Charter* (the right to 'life, security, inviolability and freedom'). In her opinion, both of these provisions prevent Quebecers from accessing alternative healthcare options that would permit them to avoid the long wait times experienced in the public sector.[86] In reviewing the evidence, Justice Deschamps pointed to a number of countries where public and private healthcare systems 'co-exist,' including Austria, the Netherlands, Germany, Australia, the United Kingdom and Sweden. In her opinion,

[84] Manfredi and Maioni 2006, 265.
[85] Manfredi 2014, 142.
[86] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at para 45.

these countries demonstrate that "a wide range of measures [exist] that are less drastic, and also less intrusive in relation to protected rights."[87] She further argued that legislative inaction – in this case, the Quebec legislatures' unwillingness to address the issue of long public wait times – provides an opportunity for the Court to step in and fill the policy void.[88]

Turning to section 1 of the Canadian *Charter* and section 9.1 of the Quebec *Charter*, the two 'reasonable limits' provisions, Justice Deschamps maintained that the objectives of the prohibition (to provide/offer quality medical services for Quebecers irrespective of one's ability to pay for these services) was pressing and substantial.[89] However, she found that section 15 of the *Health Insurance Act* and 11 of the *Hospital Insurance Act* did not minimally impair on the Quebec *Charter*, as there were less restrictive means available to the Quebec government.[90]

Chief Justice Beverly McLachlin and Justice Major, with Justice Bastarache concurring, agreed with Justice Deschamps that the prohibition violated section 1 of the Quebec *Charter of Human Rights*. Contrary to their colleague, however, they also found that section 7 of the Canadian *Charter* had been violated. McLachlin C.J. and Major J. found that the prohibition engaged section 7 *Charter* rights by "failing to provide public health care of a reasonable standard within a reasonable time."[91] In their opinion, the ban on private health insurance deprived Quebecers, save for those with the financial means to pay for medical services out of pocket, from seeking alternate means of avoiding long wait times in the public sector. They further argued that these lengthy wait times subjected patients to prolonged physical and/or psychological suffering and, in some cases, increased the risk of complications and/or death.[92]

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[87] Ibid., at para 78-83.
[88] Ibid., at para 96-7.
[89] Ibid., at para 49 & 56.
[90] Ibid., at para 98 & 100-01.
[91] Ibid., at para 102, 105 & 123.
[92] Ibid., at para 106, 111-13 & 117.

Looking to other jurisdictions with hybrid healthcare regimes, McLachlin C.J. et al. claimed, "there is no real connection in fact between prohibition of health insurance and the goal of a quality health system."[93] In their opinion, two-tier healthcare systems in Germany, the UK and Sweden demonstrate that greater privatization provides "their citizens [with] medical services superior to and more affordable than the services presently available in Canada."[94] Thus, McLachlin C.J. et al. found that the prohibition on private health insurance unjustifiably infringed on section 7 of the Canadian *Charter*. In their opinion, there was no rational connection between the prohibition and government's objectives. They further found that Quebec's healthcare policies were not minimally impairing given the availability of less intrusive options. Accordingly, they found that the prohibition violated both section 7 of the Canadian *Charter* and section 1 of the Quebec *Charter*.[95] Taken collectively, the majority on the Court declared section 15 and 11 to of no force or effect to the extent that the provisions violated the Quebec *Charter*.[96]

As the proceeding analysis has demonstrated, Justice Deschamps and Chief Justice McLachlin et al. came to very different conclusions with respect to whether the prohibition violated section 7 of the Canadian *Charter of Rights*. Nonetheless, all four justices agreed that the prohibition violated section 1 of the Quebec *Charter*. This finding, however, is problematic for a number of reasons. First, the majority based their analysis heavily, if not entirely, on the findings of the Kirby report. For example, McLachlin C.J. and Major J. reference the Kirby Report ten times, while only referencing the Romanow Report once, thus demonstrating a clear policy preference for greater privatization in Quebec.[97] What is particularly interesting about this finding is that the majority drew heavily on the Kirby Report, yet it did not properly consider the

[93] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at para 136 & 139.
[94] Ibid., at para 140, 144 & 146.
[95] Ibid., at para 155-56 & 159.
[96] Manfredi and Maioni 2006, 265-66.
[97] Manfredi 2014, 145.

quality or credibility of the report's findings, nor did they explain why, in their opinion, the findings of the Kirby Report were more reliable than that of the Romanow Report.[98]

An additional factor to consider is that the majority was convinced that other 'less restrictive' policy options were available to the Quebec government. They based their decision in large part on their (perhaps mistaken) belief that, overall, countries with two-tier healthcare systems fare better in terms of wait-times. The evidence, however, does not support this conclusion. Countries with hybrid healthcare schemes also face similar wait-time issues as those experienced in single-tier systems.[99] If it were true that two-tier healthcare systems drastically reduce wait times, the expectation is that these other countries would not experience similar wait time problems as that experienced in single-tier systems.[100] Simply put, McLachlin C.J. and Major J. do not adduce any concrete empirical data to support the strong claim that two-tier systems offer "superior medical services" than single-tier systems.

This finding seems to confirm that as a legal institution, as opposed to a political one, the Supreme Court lacks the ability to properly consider, debate and evaluate the evidence before them. Unlike the federal and provincial legislatures, courts lack the institutional capacity to make informed decisions with respect to complex and salient issues of public policy. This is seen in the fact that the majority was heavily biased in favor of the Kirby Report, as well as the fact that they failed to properly evaluate wait-times in other jurisdictions before coming to the bold conclusion that Quebec's healthcare system was overall worse off than countries with hybrid systems.

It is also important to consider that Justice Deschamps' analysis focused on the Quebec *Charter*, as opposed to the Canadian one. Her rationale for doing so is that the Quebec *Charter* has a "considerably broader purpose," meaning that section 15 of the *Health Insurance Act* and

[98] Manfredi and Maioni 2006, 270.
[99] Flood and Xavier 2008, 621; Flood 2008, 213.
[100]Flood 2008, 213.

11 of the *Hospital Insurance Act* would be at an increased risk of being invalidated under the Quebec *Charter* than the Canadian *Charter*.[101] At least to some degree, this choice might also be motivated by the majority's belief that in Quebec, where the Canadian *Charter of Rights and Freedoms* has never been popular, judicial invalidation would be perceived to have a greater degree of legitimacy and authority if it were based on the Quebec *Charter*. This can be evidenced by the fact that McLachlin C.J., along with Justices Bastarache and Major, essentially advanced the same arguments as that provided by Deschamps J. Paradoxically, Chief Justice Beverly McLachlin et al. found that the prohibition violated both the Canadian and Quebec *Charters*, while Deschamps J. found that it only violated the Quebec *Charter*.[102]

A final factor to consider is that neither the Quebec nor the Canadian *Charter* includes a health rights provision. The majority on the Supreme Court, therefore, relied on legal rights provisions in order to make the case that the prohibition on private health insurance deprived Quebecers of their health rights. In other words, the majority on the Court adopted a broad interpretation of section 7 of the Canadian *Charter* and section 1 of the Quebec *Charter* in an attempt to provide them with the opportunity to judicialize healthcare policy.

Having considered the majority's decision in *Chaoulli*, the next section reviews that of the minority. As will be explored, Binnie et al. were much more deferential to the Quebec government than their colleagues.

[101] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at para 25.
[102] Bateman 2006, 321.

4.6 The Minority on the Supreme Court of Canada: *Chaoulli v. Quebec (Attorney General)* [2005]

The minority on the Supreme Court of Canada – namely, Justices Binnie and LeBel, with whom Fish J. concurred – argued that the majority overstepped in finding that Quebec's prohibition on private health insurance violated either the Quebec *Charter* (all four justices on the majority), or the Canadian *Charter* (McLachlin C.J., Major J. and Bastarache J.). On multiple occasions, the minority criticized the majority for failing to properly evaluate the evidence before them. Reviewing the testimony of healthcare specialists, Justices Binnie and LeBel concluded that there was no concrete evidence to support the plaintiffs' (and the majority's) assertion that a transition to a two-tier healthcare system would 'cure' Quebec of its long wait times. The minority maintained that their colleagues failed to properly investigate the evidence presented at trial. Had they done so, they would have recognized that Quebec is not an outlier in terms of long wait times; other jurisdictions with two-tier healthcare systems also face similar wait-time problems.[103] Given the lack of conclusive data to support the claim that greater privatization would drastically reduce wait times in Quebec, the minority asserted that the public/private policy debate was better left to the discretion of elected and accountable representatives.[104]

The minority further suggested that greater privatization in Quebec would not only "have a negative impact on the integrity, functioning and viability of the public system," but it would also undermine government's objective of ensuring equal and universal healthcare coverage, as greater privatization would likely only benefit those "who have the money to afford medical insurance and [those who] can qualify for it."[105] In light of this finding, they argued that the objective of the law (equal access, irrespective of wealth or status) was rationally connected to

[103] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at para 169, 215, 217, 222, 226 & 251.
[104] Ibid., at para 161, 164, 176 & 273.
[105] Ibid., at para 165 & 181.

the means chosen (the prohibition on private health insurance).[106] While Justices Binnie and LeBel found that, in some cases, the prohibition might engage section 7 *Charter* rights because long wait lists delay access to essential healthcare services, they maintained that the infringement did not violate *any* of the principles of fundamental justice.[107] Unlike their colleagues, the minority asserted that the prohibition on private health insurance in Quebec did not violate sections 7 and 1 of the Canadian and Quebec *Charters*, respectively.

As the next section demonstrates, in spite of the majority decision's 'strong-type' features, the provincial Liberal Party of Jean Charest formally responded to the Supreme Court by enacting Bill 33, which was passed on December 13th, 2006.

4.7 Bill 33: Quebec's Response to *Chaoulli*

Approximately one year after the Court handed down its decision in *Chaoulli*, the Charest government formally responded by introducing Bill 33 (An Act to amend the Act respecting health services and social services and other legislative provisions). Three provisions of Bill 33 are relevant for this analysis: sections 41, 42 and 333.3.

Section 41 of Bill 33 repeals and replaces section 11 of the *Hospital Insurance Act*. The provision states, "no insurer may enter into or maintain an insurance contract that includes coverage for the cost of an insured service furnished to a resident." Insurers who fail to comply can be charged a fine ranging between $50,000 and $100,00 (first time offence); repeat offenders are liable to fines ranging between $100,000 and $200,000.[108] In effect, section 11 reintroduces the ban on private health insurance in Quebec.

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[106] Ibid., at para 239 & 263.
[107] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at para 265.
[108] Quebec, *National Assembly*, 37th Legis, 2nd Sess, (13 December 2006).

Section 42 of Bill 33 now authorizes Quebecers to purchase private health insurance. However, it does so only in the context of three elective surgeries – namely, hip, knee and cataract surgery,[109] which also happen to be the healthcare procedures with some of the longest wait times in the province.[110] Bill 33 does leave open the possibility that, in the future, other specialized surgeries or procedures will be added to the existing list of insurable medical services. Nonetheless, as of now, it does not offer a carte blanche for private insurance.[111]

In restricting access to private health insurance to these three surgical procedures, the Charest government prevented a parallel private market from developing in Quebec. This is because "the [low] number of admissible surgeries" under section 15 of the *Health Insurance Act*, combined with the considerably low demand for these procedures, creates unappealing and unfavorable conditions for insurance companies.[112] In other words, there is simply not enough demand for it to be financially worthwhile for insurers to supply health insurance to Quebecers who qualify under section 15. As a result, Quebecers, even those who technically qualify, will have no other choice but to turn to the public system, or to pay out of pocket.

To a certain extent, it appears that the Charest government's approach to the public/private divide conflicts with the majority's ruling in *Chaoulli*. In fact, the majority maintained that greater privatization would remedy the long wait times experienced in the public sector. They never specified, however, that Quebecers had a right to private health insurance *only* in the context of hip, knee and cataract surgeries. McLachlin C.J. et al. were of the view that long wait times, irrespective of the type of surgery, increased the risk of irreversible damage or death, and thus violated the Quebec *Charter*.[113] Thus, while the Charest government technically

[109] Manfredi and Maioni 2018, 111.
[110] Flood and Thomas 2018, 436.
[111] Manfredi and Maioni 2018, 111.
[112] Labrie 2015; See also Manfredi and Maioni 2018, 112.
[113] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at para 114.

complied with the majority in *Chaoulli*, given that Bill 33 offers an opportunity to expand the role of private health insurance in Quebec, it did so "in the narrowest way possible."[114]

Important also is the fact that wait times in the public sector – the primary issue in *Chaoulli* – have not drastically improved, even in the context of knee, hip and cataract surgeries. Average wait times for knee (4 months) and hip surgeries (3 months) in Quebec remain relatively high; nearly 10 per cent of Quebecers requiring hip or knee replacements have to wait at least six months before receiving surgery. Similarly, wait times for cataract surgery have marginally improved. Pre- and post-*Chaoulli*, patients can expect to wait roughly two months.[115]

An additional factor to consider is that these medical services (hip, knee or cataract surgery) are privately insurable only if they are performed in a specialized medical centre (SMC). Section 333.3 of Bill 33 defines a SMC as a healthcare facility (other than a hospital) where 'non-participating' physicians can provide approved surgical/medical procedures.[116] Alternatively, participating doctors are eligible for employment in SMCs in cases where public hospitals "contract out" specialized medical services to these facilities. However, surgical procedures offered in these SMCs cannot be privately insurable. Moreover, participating and non-participating physicians cannot be employed in the same specialized medical clinic, nor can they share the same resources, staff and/or equipment. Thus, Bill 33 maintains "the 'wall' between physicians who remain in the public system and those who opt out of it."[117]

A review of Bill 33 demonstrates that while the Charest Liberals complied (in part) with the majority in *Chaoulli*, the policy impact of the Court was rather limited. This section has sought to demonstrate that wait times have not drastically improved with respect to knee, hip and

[114] Flood and Thomas 2018, 436; See also Labrie 2015.
[115] Labrie 2015; See also Manfredi and Maioni 2018, 112.
[116] Quebec, *National Assembly*, 37th Legis, 2nd Sess, (13 December 2006).
[117] Manfredi and Maioni 2018, 111-12.

cataract surgeries in Quebec – the three elective procedures for which Quebecers can now purchase private health insurance. Moreover, Bill 33 introduces conditions unfavorable to the development and growth of a robust private health insurance market in Quebec. The fact remains that the pool of Quebecers who require these surgeries is too small for it to be financially worthwhile for private insurance companies. Taken collectively, this evidence suggests that Bill 33 can be properly classified as legislative noncompliance.

The Charest government's choice to respond in this manner is not surprising. The Liberal Party of Quebec's campaign platform for the 2003 elections demonstrates that healthcare policy was a top priority for the Charest government. Access to healthcare based on need, rather than Quebecers' ability to pay, was a key component of their party's mandate: "nous croyons à un système de santé public, accessible et universel."[118] It is safe to say, therefore, that the majority's decision was fundamentally at odds with the Liberal Party's healthcare vision, or, stated differently, the decision was unpopular among the Quebec National Assembly.

Having considered the Court's decision in *Chaoulli*, and the Charest Liberals' legislative response, the next section details the implications of *Carter and Chaoulli* with respect to judicial power and the McLachlin Court's policy impact.

4.8 The Policy Impact of the Supreme Court of Canada in *Carter* and *Chaoulli*

As we have seen, the Supreme Court unanimously struck down the federal prohibition on medical assistance in dying in *Carter* on the grounds that it violated section 7 ('life, liberty and security') *Charter* rights. Likewise, in *Chaoulli*, a narrow majority found that the prohibition on private health insurance in Quebec violated the Quebec *Charter of Human Rights and Freedoms*. Both of these decisions can be classified as 'strong-type' Supreme Court of Canada decisions. In

[118] Parti Libéral du Québec 2003, 4.

fact, both cases dealt with health rights, which are not technically protected under either the Canadian or Quebec *Charters*. The unanimous Court in *Carter*, and the majority on the Supreme Court in *Chaoulli*, adopted a broad interpretation of legal rights to ensure that sections 14 and 241(b) of the *Criminal Code*, and sections 15 of the *Health Insurance Act* and 11 of the *Hospital Insurance Act,* respectively, would violate protected rights. In both cases, the Supreme Court of Canada attempted to judicialize healthcare policy through its remedial activism. More importantly, they sought to create conditions unfavorable to the introduction of independent legislative responses. This is evidenced by the fact that in *Carter*, the Court delivered a unanimous decision authored by 'the Court' on an inherently divisive issue. Likewise, in *Chaoulli*, the majority recognized that in finding that the ban on private health insurance violated the Quebec *Charter*, as opposed to the Canadian one, it was unlikely that the Quebec legislature would introduce a 'strong-form' response to address judicial invalidation.

As a result of these 'strong-type' decisions, the SCC is often portrayed to be a powerful policymaking institution. These claims have some merit. The Supreme Court – as the final appellate court in Canada, and as the 'guardians of the Constitution'[119] – participate in fundamental debates on salient and controversial issues of public policy. This was the case in both *Carter* and *Chaoulli*. For some, judicial participation in these debates is cause for concern, especially when considering that the Court is an unelected and unaccountable institution, and because they lack the institutional capacity to make informed decisions and to balance competing interests.[120] In other words, scholars have questioned the legitimacy of judicial review. A common mistake in the judicialization literature, however, is the belief that because the Supreme Court has the power to strike down legislation, and because they at times do, that "they produce

[119] Huscroft 2004, 243.
[120] Macfarlane 2014, 59.

a direct policy impact."[121] Virtually no scholar contests the fact that, as a result of section 24(1) (the remedial provision), the Court behaves as a powerful institution. The crucial question remains, however, does judicial invalidation lead to fundamental policy change?

In *The Nature of the Supreme Court*, Matthew Hall argued that judicial power and policy impact is contingent on whether the actor responsible for implementing the Court's decision accepts, and thus enforces, the judicial decision. Hall (2010) maintains that in unpopular lateral issues where the Court's decision is perceived to be an impractical or illegitimate approach to public policy, the legislative response will typically be noncompliance.[122] This remains true even in the context of the 'strongest' judicial decisions, such as *Carter* and *Chaoulli*. For instance, the Trudeau Liberals introduced Bill C-14 in response to *Carter*. While the federal government implemented certain aspects of the decision, they did introduce a series of eligibility requirements that drastically narrowed the pool of applicants eligible for medical assistance in dying. Additionally, the high number of non-participating healthcare professionals also drastically limited access to MAID, even for patients who meet the eligibility criteria set forth in Bill C-14. The most forceful opposition to physician-assisted death, therefore, has come from physicians unwilling to provide assistance, not from the statute itself. This suggests that in cases dealing with healthcare rights, such as physician-assisted death, the Court requires that the federal and provincial legislatures comply with their decision. However, it also requires the support of healthcare professionals, which did not occur in the context of *Carter*.

Similarly, in *Chaoulli*, the Liberal Party of Quebec responded by enacting Bill 33, which reintroduced a near complete prohibition on private health insurance. Further, long wait times – the central issue in *Chaoulli* – remain abnormally high in Quebec, even in the context of hip,

[121] Kelly (In progress), 42.
[122] Hall 2010, 15-8.

knee and cataract surgery. Moreover, Bill 33 creates conditions unfavorable to the development of a private insurance market given the small number of surgeries that are privately insurable. Bill 33, therefore, is an example of legislative noncompliance, as the National Assembly crafted new legislation in a manner that limited the potential for a parallel private healthcare market to develop and flourish in Quebec.

Two points are important to retain here. First, Bill C-14 (in response to *Carter*) and Bill 33 (in response to *Chaoulli*) demonstrate that the Supreme Court's power is not absolute. Generally speaking, judicial invalidation leaves room for an independent legislative response that challenges the Court, even when the Supreme Court delivers decisions that appear to discourage positive legislative sequels. This was the outcome post-*Carter* and *Chaoulli*. Second, it suggests that, in unpopular lateral issues, the SCC's policymaking power will be limited. When the Court delivers decisions that are unpopular with the actors responsible for implementing the judicial decision, there is a much greater risk that the legislative response will be noncompliance.[123] Arguably, Bill C-14 and Bill 33 attest to this claim, as the respective federal and provincial legislatures introduced strong responses that defied the spirit of the Supreme Court's rulings.

4.9 Conclusion

The chapter reviewed two cases involving salient issues of healthcare policy, including physician-assisted death (*Carter*) and private health insurance in Quebec (*Chaoulli*). It also reviewed the legislative responses to *Carter* and *Chaoulli*, Bill C-14 and Bill 33, respectively. As this chapter has sought to demonstrate, a comparative review of the Supreme Court's decisions

[123] Hall 2010, 17-8.

and the corresponding legislative responses confirms Matthew Hall's (2010) claim that the Supreme Court's policy impact is rather limited in cases involving unpopular lateral issues.[124]

In *Carter* and *Chaoulli*, the Supreme Court attempted to judicialize healthcare policy through its remedial activism, and through its broad interpretation of legal rights. In *Carter*, the Court maintained that grievously and irremediably ill persons had a right to physician-assisted death. While Bill C-14 complies in some respects, it introduces a more tailored (or narrow) approach to medical assistance in dying, thus reducing the number of eligible applicants. The chapter also demonstrated that an overwhelming number of physicians conscientiously object to physician-assisted death, which creates an additional barrier to access PAD. While physician-assisted death is now technically legal, relatively few Canadians are eligible, and, if they are, relatively few are able to find a physician willing to provide these services.

Similarly, in *Chaoulli*, a narrow majority on the Court found that sections 15 of the *Health Insurance Act* and 11 of the *Hospital Insurance Act* violated the Quebec *Charter*. In response, the Charest government enacted Bill 33, which reintroduced a near complete ban on private health insurance, with the notable exceptions of knee, cataract and hip surgeries. The relatively small number of privately insurable surgical procedures, combined with the relatively small number of subscribers for this type of insurance, however, creates a number of disincentives for private insurance companies. As a result, patients who require these medical procedures will have no other choice but to 'wait their turn' in the public system. In other words, relatively little has changed with respect to the long wait times in the public system, the crucial reason the majority on the Court struck down the provisions to begin with.

To summarize, this chapter demonstrated that judicial power is contingent on whether the non-judicial actors tasked with implementing the Supreme Court's decision support the judicial

[124] Hall 2010, 17-8.

decision. This is because, in lateral issue areas, the Court lacks the enforcement mechanisms required to guarantee compliance. In *Carter*, the Court's decision was unpopular (in part) with the Trudeau Liberals, and, more importantly, with healthcare professionals. In *Chaoulli*, the decision was fundamentally at odds with the Charest government's universal healthcare model. In response, therefore, the respective legislatures introduced positive dialogic sequels that significantly constrained the policymaking capacity of the McLachlin Court. The end result is that relatively little changed post-*Chaoulli* and post-*Carter*. Contrary to the position advanced by right-wing critics, this finding suggests that judicial activism did not result in fundamental policy change.

5

The Judicialization of Minority Language Education Policy in Quebec

The chapter considers two minority-language education rights cases in Quebec where the Supreme Court of Canada invalidated sections of the *Charter of the French Language* for their inconsistency with section 23 of the Canadian *Charter of Rights and Freedoms* – namely *Solski (Tutor of) v. Quebec* (2005) and *Nguyen v. Quebec (Education, Recreation and Sports)* (2009). In *Solski*, the McLachlin Court maintained that a quantitative approach to the 'major part' criterion used for evaluating certificates of eligibility for instruction in English in Quebec was unconstitutional. Likewise, in *Nguyen*, the Court found that the absolute prohibition on bridging schools in Quebec was an unjustifiable infringement on section 23 *Charter* rights (minority-language education). The chapter also reviews the Quebec government's response to *Solski* and *Nguyen*, Bill 115 (An Act following upon the court decisions on the language of instruction) and the corresponding regulations (Regulation respecting the criteria and weighting used to consider instruction in English received in a private educational institution not accredited for the purpose of subsidies).

The chapter demonstrates that *Solski* and *Nguyen* are two examples of cases involving unpopular lateral issues. In other words, these cases concern a policy area (minority-language education) where the Quebec National Assembly, the non-judicial actor responsible for implementing these decisions, perceives the Supreme Court's ruling to be an impractical or undesirable policy outcome. Indeed, the Canadian *Charter of Rights and Freedoms* has never been popular in Quebec, particularly for the Francophone community. By and large, Quebecers perceived the inclusion of section 23 (the minority-language rights provision) as the unwarranted

intrusion of the federal government, and the Supreme Court of Canada, in a policy area crucial to preserving Quebec's unique linguistic and cultural status in Canada and in North America.[1] Similarly, the Quebec National Assembly has historically been highly critical of judicial invalidation of provisions of the *Charter of the French Language*. This is evidenced by the fact that the typical response of the Quebec government to statutory invalidation of minority-language education laws, irrespective of party affiliation, has been legislative non-compliance.[2]

In both *Solski* and *Nguyen*, the McLachlin Court authored unanimous decisions that initially appeared to be clear legal victories for the Anglophone and Allophone communities in Quebec. This celebration, however, was short lived. As this chapter argues, there are two features of Bill 115 (and its corresponding regulations) that stand out as examples of legislative non-compliance, or as positive dialogic sequels: first, it reintroduces the quantitative approach to the 'major part' requirement which was invalidated by the Court in *Solski*; and second, it reintroduces a near complete ban on bridging schools in Quebec, which had been invalidated by the McLachlin Court in *Nguyen*. In effect, the objective of Bill 115 is the exact same as Bill 86 (quantitative approach) and 104 (bridging schools), which had been previously struck down by the Supreme Court: to prevent the growth of the Anglophone community in Quebec by restricting access to instruction in English in Quebec to the existing Anglophone community. Put simply, the policy impact of the Supreme Court of Canada in both cases was rather limited; Bill 115 ensures that relatively few, if any, non-Anglophone applicants will be eligible for instruction in English in Quebec.

The chapter will proceed in the following way. First, it provides a historical overview of minority-language education rights in Quebec. It points to some of Quebec's early policy

[1] Richez 2014, 192.
[2] Kelly 2018, 252.

developments with respect to language laws, focusing specifically on the *Charter of the French Language*. It then offers a summary of *Solski (Tutor of) v. Quebec*, including an overview of the litigants involved, the relevant provisions and the lower court decisions. Next, the chapter provides a textual analysis of the Supreme Court's decision in *Solski*. Following a similar pattern, the chapter then analyzes *Nguyen v. Quebec (Education, Recreation and Sports)*. After reviewing both cases, the chapter evaluates the legislative response to *Solski* and *Nguyen* – Bill 115 and its corresponding regulations. Finally, the chapter discusses the implications of Bill 115 with respect to judicial power and the McLachlin Court's policy impact.

5.1 Minority Language Education Rights in Quebec

In the 1960s and 70s, immigration rates in Canada began to drastically rise. Until 1969, Allophones had the 'freedom to choose' whether to receive their primary and/or secondary education in either English or French in Quebec.[3] Accordingly, an alarming number of immigrants had been enrolling in English public schools, resulting in a substantial decline in the overall number of French-speaking Quebecers in the province. High enrolment rates in English public schools, combined with a declining birthrate among the Francophone population in Quebec, served as the impetus driving reforms to language education laws in the province. In particular, the Quebec government perceived the growing Anglophone community to be a direct threat to the French language and culture.[4] It is important here to note that the preservation and flourishment of the French language has always been a top priority for Quebec governments, irrespective of party affiliation.[5]

[3] Tetley 1982, 192; See also Kelly 2018, 253.
[4] Tetley 1982, 191; Conrick 2005, 9-10.
[5] Kelly 2018, 252.

In 1974, Liberal Premier Robert Bourassa introduced Bill 22, the Official Language Act. Bill 22 required that students demonstrate "sufficient knowledge" in French or English in order to be eligible to receive their education in either language. Furthermore, it maintained that students who did not have "sufficient knowledge" of either English or French – in other words, immigrants – would only be eligible to receive their education in Quebec in French.[6]

Three years later, in an attempt to preserve Quebec's linguistic identity and unique culture, the Parti Québécois introduced Bill 101, also known as the *Charter of the French Language*. Under section 73 of Bill 101, students were eligible to attend an English public or a subsidized private elementary or secondary school *only* if either one of their parents had been educated in English in Quebec, or if their siblings (or they themselves) had been previously enrolled in an English school in Quebec. The objectives of section 73 were twofold: to oblige the Allophone and Francophone communities to receive their education in French, and secondly, to ensure that only existing members of Quebec's Anglophone community would have a right to receive their education in English.[7] While widely supported by French-speaking Quebecers, Anglophones were particularly dissatisfied with the outcome of Bill 101.

In 1980, Quebec held a referendum on the issue of Quebec's sovereignty. While defeated, the Quebec referendum exacerbated existing tensions between Quebec's two linguistic communities.[8] Shortly thereafter, the Trudeau government, without the consent of Quebec, introduced the Canadian *Charter of Rights and Freedoms*. The Quebec government was particularly hostile to the *Charter*, namely because of the inclusion of the minority language rights provision (section 23). Sections 23(2) and (3) of the *Charter* state that, where numbers warrant, the children or siblings of linguistic minorities whom have been educated in either

[6] Kelly 2018, 253.
[7] Kelly 2018, 253; Chouinard 2018, 234.
[8] Chouinard 2018, 235.

official language in Canada have the right to receive their primary and/or secondary education in the minority language in their province of residence.[9]

Section 23 stands out when compared to other enumerated rights and freedoms insofar as it is the only provision in the *Charter* that deals with a positive right, and that "directly applies to an area of provincial jurisdiction (language and education policy) [and which] targets a specific province (Quebec)."[10] Moreover, the language rights provision is among a select few *Charter* rights where the notwithstanding clause (section 33) does not apply.[11] Arguably, in excluding section 23 from the legislative override, the Trudeau government sought to ensure that, in the likely event that the courts would strike down Quebec's 'controversial' language laws, the Quebec government would have no formal override powers at their disposal.[12]

Rightfully so, Quebecers perceived section 23 as a direct attack on Quebec's linguistic and cultural distinctiveness, and as the Trudeau government's unwarranted interference in a policy area critical to preserving Quebec's autonomy.[13] In the weeks following the enactment of the *Charter*, Camille Laurin, speaking on behalf of the Parti Québécois, maintained that "section 73 of Bill 101 would continue to apply in full force" in spite of the *Charter*.[14] In 1984, two years after the *Charter* came into force, the constitutionality of section 73 was questioned in *Protestant School Boards*. In a unanimous decision delivered by 'The Court,' the SCC struck down section 73 for unjustifiably infringing on Anglophones' s. 23 rights; the Court maintained that Canadians educated in English had a right to receive their education in English in Quebec. In *Protestant School Boards*, the Supreme Court of Canada also "considered the political intention of [section

[9] Canadian Heritage 2017, 5-6.
[10] Kelly 2018, 250.
[11] Richez 2014, 226; Gagnon and Laforest 1993, 479; Tetley 1982, 212; Riddell and Morton 1998, 485.
[12] Kelly 2018, 253-54.
[13] Richez 2014, 192.
[14] Tetley 1982, 210.

23 of the *Charter*] and concluded that it had been drafted with the explicit intention of invalidating section 73 [of Bill 101]."[15]

At the outset, it appears as though the Supreme Court's decision in *Protestant School Boards* constituted a significant blow to the Quebec government's objective of protecting its unique culture and language. As will be discussed in further detail in the proceeding section, this was not the outcome. In response to the Court's decision, the Quebec government introduced a series of amendments to its language laws. These changes to the *Charter of the French Language*, however, were further challenged in *Solski* (2005) and *Nguyen* (2009).

5.2 Overview of *Solski*

In 1993, the Quebec government responded to the Court in *Protestant School Boards* by introducing Bill 86, which amended section 73 of the *Charter of the French Language*.[16] Section 73 states that "children, at the request of their parents, may receive" their education in English if either of the child's parents, the child's siblings or the child themself had previously completed the "major part of [their] elementary or secondary instruction" in Canada in English.[17] The choice of wording is significant for a number of reasons. First, the inclusion of the words 'may receive' indicates that these rights are not absolute; eligibility is conditional on the Minister of Education's willingness to authorize such persons to receive their education in English in Quebec. Second, the major part requirement departs from the wording of s. 23 of the Canadian *Charter*. Recall that s. 23 states that, where numbers warrant, members of linguistic minorities who have "received or [are] receiving" their primary or secondary education in Canada have a

[15] Kelly 2018, 254 & 257-58; see also Chouinard 2018, 236-37.
[16] Kelly 2018, 257.
[17] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R 201 at para 12.

right to minority-language instruction in their province of residence.[18] In stark comparison, s. 73(2) states that persons are eligible to receive their education in English in a public institution in Quebec *only* if they have completed the "major part" of their education in English in Canada. In making such determinations, the Minister of Education focused exclusively on the number of months the child spent in an English school. Other factors, for example, learning disabilities, were not given due consideration.[19]

In *Solski*, the constitutionality of s. 73 was challenged by three families – the Solski, Casimir and Lacroix families – all of whom had been denied eligibility certificates on the grounds that their children had not completed the "major part" of their education in Canada in English. In 1990, the Solski family temporarily moved to Quebec for work purposes. During this time, the children had been granted exemptions to receive their education in English. In 1993, the Solski family decided that they would permanently stay in Quebec, and applied to have their children receive their education in English. Their children were deemed ineligible because they had spent more time in French schools (34 months) than in English schools (24 months). Similarly, Edwidge Casimir's two children had been enrolled in St. Elizabeth School, which offered a French-immersion program; fifty per cent of their curriculum was in English, and fifty per cent was in French. She applied to have her children receive their education in English, but was also denied on the basis that her children were ineligible. The final appellant, Marie Lacroix, received her education in Quebec in French. One of her two children attended an unsubsidized private French school for two years, and was then enrolled in an unsubsidized private French-

[18] Canadian Heritage 2017, 5.
[19] Kelly 2018, 257; *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R 201 at para 25.

immersion school (sixty per cent of the classes were in English, and 40 per cent in French). They were also denied an eligibility certificate.[20]

The Solski family, the primary plaintiffs in the case, sought to have section 73 of Bill 86 invalidated for its inconsistency with s. 23 of the *Charter*. They argued that the 'major part' requirement deprived their children of their right to complete their secondary-school education in English in Quebec, and that the law was overly restrictive insofar as it "narrow[ed] the category of eligible rights holders" under s. 23 of the *Charter*.[21] The trial judge on the Superior Court of Quebec found that section 73 was inconsistent with the intentions of the framers, as the *Charter* did not stipulate the duration of time that must be spent in an English school in Canada in order to be eligible for minority-language education in Quebec. Thus, the trial judge invalidated section 73 on the basis that it was an unjustifiable infringement on *Charter* rights.

Unsatisfied with the outcome at trial, the Attorney General of Quebec appealed the judgment to Quebec's Court of Appeal. Once again, the justices found that section 73 was unconstitutional because it provided the Minister of Education unfettered discretion in determining whether children were entitled to receive their education in English in Quebec.[22] The decision was further appealed to the Supreme Court of Canada.

5.3 The Supreme Court of Canada: *Solski (Tutor of) v. Quebec (Attorney General)* [2005]

On March 31st, 2005, in a unanimous decision authored by 'The Court', the SCC delivered their decision in *Solski*. At trial, the Attorney General of Quebec argued that a purely quantitative approach to the 'major part' criterion was sufficient to ascertain whether applicants met the eligibility requirements set forth in section 73(2) of Bill 86. The Quebec government further

[20] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R 201 at para 13-16.
[21] Ibid., para 17.
[22] Ibid., at para 17-8.

argued that provinces have exclusive jurisdiction over minority-language education rights and, as a result, have the power to legislate accordingly. Drawing on the wording of section 23(2) of the *Charter of Rights*, the Court maintained that nowhere did the language provision draw distinctions based on the amount of time a child spent in an English educational institution. Likewise, section 23(2) does not stipulate that the amount of time spent in an English school must be greater than that spent in a French school in order to be eligible.[23]

While the Court recognized that minority-language rights in Quebec was a "sensitive issue," they nevertheless argued that that the "strict mathematical" (or quantitative) approach, i.e., the number of months spent in an English school, used by the Minister of Education to ascertain whether the child satisfied the 'major part' requirement unjustifiably infringed on s. 23(2) *Charter* rights.[24] The Court found that the quantitative approach placed too much emphasis on the time a child spent in an English educational institution, while not giving sufficient consideration to the "past and present educational experience" of applicants.[25] The Court argued that a qualitative, contextualized and case-by-case approach to the 'major part' criterion would constitute as a justifiable infringement on *Charter* rights. They further listed a number of criteria that *must* guide the Minister of Education in making such determinations, including: the amount of time that a child spent in French and/or English school; whether the child suffers from learning disorders or other disabilities that may impair their capacity to learn; their educational stage; and lastly, the number as well as nature of English education programs in the province.[26]

In remedying the constitutional violation, the Court severed the 'major part' requirement and replaced it with the less restrictive requirement of 'substantial part.' According to the

[23]*Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R 201 at para 41.
[24]Ibid., at para 5, 26-8 & 35.
[25] Ibid., at para 28.
[26] Ibid., at para 26-28, 38 & 41.

McLachlin Court, applicants had to have spent a 'considerable' amount of time in an English school in Canada in order to be eligible for instruction in English in Quebec.[27] The Court did not, however, stipulate the time frame required to satisfy the 'substantial part' criterion, but they did caution against the use of "artificial educational pathways" to meet this requirement.[28] In other words, the Supreme Court argued that students who were enrolled in English school for short periods of time, for example, several weeks or months, failed to meet the 'substantial part' threshold established by the Court in *Solski*.[29]

There are a number of 'strong-form' features of the Supreme Court's decision in *Solski* that are important to consider. In *Solski*, the Court chose to severe the statute by removing the 'major part' requirement of section 73 and replacing it with the less intrusive criterion of 'substantial part.' In theory, the Court could have chosen to invalidate the legislation, thus leaving up to the Quebec legislature to fashion an independent response to address the constitutional infirmities raised by the Court. Instead, the McLachlin Court chose to cure the rights violations themselves. In most cases, judicial severance does not fundamentally alter the objectives of the legislation, and could thus be adequately described as "mere housekeeping."[30] In this case, however, judicial amendment has the potential to undermine the Quebec government's objective of preserving the French language in Quebec. This is because the 'substantial part' requirement is a much lower threshold than the 'major part,' thus leaving open the possibility that a greater number of applicants will qualify to receive their education in English in Quebec than would have otherwise been possible had the original version been upheld by the Court.

[27] Ibid., at para 51.
[28] Kelly 2018, 259.
[29] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R 201 at para 28, 39 & 56.
[30] Kelly (In progress), 25.

The choice of remedy is especially significant when one considers the fractious relationship between the Supreme Court of Canada and the Quebec government that has developed in the context of minority-language education laws. Over the last sixty or so years, Quebec governments, irrespective of party affiliation, have tended to be particularly hostile to the idea of letting the Supreme Court intrude into this core area of provincial jurisdiction, specifically when considering that language laws are essential for preserving the French language in Quebec. It is not surprising, therefore, that the common theme of legislative responses to judicial invalidation of minority language laws in Quebec has been non-compliance. This perhaps explains why the Court opted for a more interventionist remedy in *Solski*, and why the Supreme Court delivered a unanimous decision in the name of 'The Court.' Simply put, the Court sought to do everything in its power to ensure that the *Solski* decision would be complied with, as the decision was authoritative ('The Court') with an imposed remedy.

Moreover, the Supreme Court found that a 'purely quantitative' approach to the 'major part' requirement was unconstitutional. The Court went on to list a number of criteria that must factor into the Minister of Education's decision to grant or refuse applications for eligibility. Thus, the Court not only told the Quebec government what they could not do with respect to minority-language education, they also established the constitutional parameters of Ministerial discretion. In this respect, the Court behaved more as a policymaker, or as a "de facto third chamber," than as a court responsible for resolving constitutional disputes between parties.[31]

As will be explored in section 5.6, the Quebec government introduced Bill 115 in response to the Supreme Court's decision in both *Solski* and *Nguyen*. Accordingly, the chapter will first provide an overview of *Nguyen v. Quebec (Education, Recreation and Sports)*, and will

[31] Kelly (In progress), 10.

also consider the Supreme Court's decision in *Nguyen*, before proceeding to analyze the legislative response.

5.4 Overview of *Nguyen*

In 2002, the Parti Québécois, under the leadership of Bernard Landry, introduced Bill 104, which modified section 73 of the *Charter of the French Language* in an attempt to address the growing issue of bridging schools in the province.[32] The objective of Bill 104 was to deny students who were registered in 'bridging schools' – in other words, students temporarily enrolled in unsubsidized private English schools for short periods of time with the intent to later transfer to public English schools – the right to complete their education in a public English primary and/or secondary school in Quebec. Properly understood, bridging schools constituted a 'legislative loophole' that would provide students who would otherwise be ineligible to attend public or subsidized English schools an opportunity to bypass the eligibility requirements set forth in section 73.[33]

In 2004, 131 families challenged the constitutionality of section 73 of Bill 104 on the grounds that it violated s. 23 of the *Charter of Rights*.[34] Although Canadian citizens, the parents of these children did not receive their primary school education in Canada, presumably because they immigrated after having completed their studies. Consequently, all of the families had enrolled their kids in unsubsidized private English schools in an attempt to satisfy the eligibility requirements of s. 73, and thus to eventually register their children in public English schools in Quebec. All of the requests had be denied by the Minister of Education.[35]

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[32] Quebec, *National Assembly*, 36th Legis, 2nd Sess, (13 June 2002), page 3.
[33] Chouinard 2018, 240; See also *Nguyen v. Quebec (Education, Recreation and Sports)*, [2009] 3 S.C.R. 208 at para 38.
[34] Kelly 2018, 259; Ibid., at para 13.
[35] *Nguyen v. Quebec (Education, Recreation and Sports)*, [2009] 3 S.C.R. 208 at para 9.

The Administrative Tribunal of Quebec (ATQ) first heard the *Nguyen* case. They concluded that the amendments to section 73 were constitutional. At the Quebec Superior Court, the trial judge upheld the Tribunal's decision, which was later appealed to the Quebec Court of Appeal. In a 2:1 decision, the Court of Appeal found that s. 73 unjustifiably deprived the appellants of their s. 23 *Charter* rights by denying them the possibility "to continue their educational pathways in English in a public school or a subsidized private school."[36] The Attorney General of Quebec later appealed the decision to the Supreme Court of Canada.

5.5 The Supreme Court of Canada: *Nguyen v. Quebec (Education, Recreation and Sports)* [2009]

The Supreme Court of Canada delivered its unanimous decision authored by Justice LeBel in *Nguyen* on October 22nd, 2009. Drawing on section 23 of the *Charter*, the Supreme Court asserted that the minority-language rights provision did not stipulate the type of institution (private or public) that was required to satisfy the "is receiving or received" requirement. Justice LeBel maintained, however, that when students enroll in bridging schools for the sole purpose of "artificially qualifying […] for admission to the publicly-funded English-language school system," that they have failed to demonstrate a "genuine educational commitment" to the minority language.[37] In some respects, therefore, the Court recognized that bridging schools could pose a significant threat to government's objective of protecting Quebec's distinct linguistic character.

In its section 1 analysis, which considered the reasonableness of the rights infringement, the Court found that the objectives of Bill 104 were 'pressing and substantial' in light of

[36] Ibid., at para 14-5.
[37] Ibid., at para 32 & 36.

Quebec's unique linguistic status in Canada and in North America. However, they found that the blanket prohibition on bridging schools did not minimally impair on *Charter* rights. The Court maintained that, given the relatively low number of students who had artificially enrolled in unsubsidized private schools with the intent to later transfer to the English public school system, the absolute prohibition was "overly drastic." Section 73 of Bill 104, therefore, could not be saved by section 1 of the *Charter*.[38]

The Court's section 1 analysis is problematic because it rests on the misconception that while the use of bridging schools poses a threat to the French language in Quebec, the seriousness of the problem does not warrant a blanket prohibition on bridging schools. The evidence, however, suggests otherwise. In Quebec, the use of bridging schools had become more and more common over the years. For example, in the 2002-03 academic year, roughly 2100 students attended unsubsidized private English schools in Quebec in an attempt to qualify for public instruction in English. Only five years later, this figure nearly doubled.[39] Given this finding, it is likely that, without an absolute prohibition on bridging schools, this figure would steadily increase over the years. As a result, it would pose a more serious risk to the French language in Quebec. Perhaps more importantly, an absolute prohibition on bridging schools would prevent successive generations from being eligible to receive their instruction in a public English school in Quebec simply on the basis that their parents had completed the 'major part' of their education in an unsubsidized private English school. Arguably, therefore, the Supreme Court mistakenly downplayed the severity of the problem of bridging schools in Quebec in an attempt to ensure a favorable outcome at trial.

[38] *Nguyen v. Quebec (Education, Recreation and Sports)*, [2009] 3 S.C.R. 208 at para 40-2.
[39] Kelly 2018, 258.

Upon closer inspection, the Supreme Court's section 1 approach, particularly their less-restrictive means analysis, is also problematic because it significantly impaired Quebec's ability to prohibit the use of bridging schools, "a policy tool that would have been helpful in integrating newcomers into the French public culture."[40] In other words, the *Nguyen* decision increased the likelihood that members of the Allophone community would resort to the use of bridging schools in an attempt to circumvent existing restrictions on minority-language education laws in the province.

Consistent with its approach in *Solski*, the Court advocated for a qualitative, and, in their opinion, less restrictive approach to bridging schools. In particular, the Court urged the Minister of Education to consider three factors when determining whether applicants' educational pathway demonstrated a 'genuine commitment' to the minority language, including: the amount of time spent at the educational institution, the program in place at that particular school and the school's nature and history.[41] The Court, however, did not specify the amount of time that a student must spend in an unsubsidized private English school in order to demonstrate an authentic commitment to an English educational pathway. Citing the Court's decision in *Solski*, Justice LeBel reasserted, however, that a "short period of attendance" at such institutions was insufficient to meet the threshold.[42]

Arguably, the Supreme Court was overly (and unnecessarily) prescriptive in its judgment. In *Nguyen*, the Court suggested, albeit implicitly, that the only way the prohibition on bridging schools would constitute as a justifiable infringement on section 23 *Charter* rights was if the National Assembly complied with the constitutional parameters established by the Court in its

[40] Richez 2014, 217.
[41] *Nguyen v. Quebec (Education, Recreation and Sports)*, [2009] 3 S.C.R. 208 at para 44.
[42] Ibid., at para 29.

decision. In this respect, the McLachlin Court overstepped its constitutional role in *Nguyen* by behaving more as a policymaker than as a final appellate court.

In spite of *Nguyen*'s 'strong-type' features, the Supreme Court opted to suspend its declaration of invalidity for one year to provide the Quebec government with the appropriate time to fashion a legislative response. Despite having found that s. 73 unjustifiably infringed on section 23 of the *Charter*, the Court did not immediately grant the applicants eligibility certificates. Rather, the Court demanded that the applicants of the 131 families be returned to, and reconsidered by, Quebec's Minister of Education "in light of the criteria established in *Solski* and in this judgment."[43] The Supreme Court, however, immediately granted Satbir Bindra (one of the claimants in *Nguyen*) a certificate of eligibility.[44]

Undeniably, the Supreme Court's decision in *Solski* and *Nguyen* were clear constitutional loses for the Quebec government. Nonetheless, the National Assembly of Quebec responded to the Court by introducing Bill 115, which outright defied the Supreme Court's rulings. As will be explored, the Court's policy impact was thus rather limited.

5.6 Bill 115: Quebec's Response to *Solski* and *Nguyen*

In 2010, the Quebec government formally responded to both *Solski* (quantitative approach to 'major part' requirement) and *Nguyen* (prohibition on unsubsidized private schools) via the introduction of Bill 115 (An Act following upon the court decisions on the language of instruction). Three provisions of Bill 115 are relevant for the purposes of this analysis – namely, section 73.1, which was amended in response to *Solski*, and sections 78.2 and 12.2, which were added in response to *Nguyen*. This section also reviews the regulatory framework introduced by

[43] Ibid., at para 46-7.
[44] Ibid., at para 47.

the Charest government in response to both *Solski* and *Nguyen* i.e., the Regulation respecting the criteria and weighting used to consider instruction in English received in a private educational institution not accredited for the purposes of subsidies. Bill 115, and the corresponding regulations, demonstrates the extent to which minority-language education laws, and the preservation of the French culture and language, more generally, are a top priority for the Quebec government.

Section 73.1 of Bill 115 permits the use of an analytical (or regulatory) framework when making determinations with respect to certificates of eligibility for public instruction in English in Quebec. In particular, section 73.1 indicates that the "framework may, among other things, establish rules, assessment criteria, a weighting system, a cutoff or a passing score and interpretive principles."[45] On the other hand, section 78.2 prohibits the use of bridging schools, or unsubsidized private schools, for the sole purpose of circumventing minority-language education laws in Quebec. Moreover, section 12.2 grants the Minister of Education the power to deny applications on the grounds that "doing so would allow the circumvention of section 72 of the Charter of the French language or of other provisions of that Act governing eligibility for instruction in English." Section 12.2 also states that the Minister of Education, in an attempt to prevent the artificial use of bridging schools, can "subject a permit to any condition the Minister judges necessary."[46]

At first glance, it appears as though the Charest government complied with the Court's decision in both *Solski* and *Nguyen*. Section 73.1, for example, authorizes the use of a more comprehensive and 'qualitative' approach for assessing the eligibility criteria and, in this respect, addresses the concerns raised by the Court in *Solski*. Similarly, section 12.2 states that the

[45] Quebec, *National Assembly*, 39th Legis, 1st Sess, (19 October 2010).
[46] Quebec, *National Assembly*, 39th Legis, 1st Sess, (19 October 2010).

Minister of Education 'may refuse' certificates of eligibility, thus removing the absolute prohibition on bridging schools found to be unconstitutional by the Court in *Nguyen*.[47] Taken collectively, these three provisions permit a contextualized or case-by-case evaluation of certificates, and thus give the impression that the Quebec government complied with the Supreme Court's decision in *Solski* and *Nguyen*. A review of the regulatory framework used to assess whether applicants meet the 'major part' criteria, however, suggests quite the opposite.

In order to be eligible to apply for a certificate of eligibility, applicants must receive a minimum weighted score of 15 points. The points are calculated based on three criteria: (1) the 'schooling' division, which considers the amount of time spent in an English school, the programs offered at the institution, and any other relevant criteria pertaining to the student's education; (2) the 'consistent, true commitment' division, which considers the 'authenticity' of the student's educational pathway; and (3) the 'specific situation and overall education' division, which considers the motivations underpinning the choice to apply for a certificate of eligibility, the applicant's educational stage and whether the child's parents were educated in another language other than English (i.e., Allophones).[48]

English private educational institutions are classified as either type A, B or C. Points are allocated depending on the total number of years for which the applicant attended an unsubsidized private school, as well as the percentage of English and French instruction offered at that particular school. Private English schools are classified as type 'A' if more than 60 per cent of its students obtained a certificate of eligibility. They are also classified as type 'A' if at least 70 per cent of the student body completes their elementary and secondary education at the same institution, *and* if a minimum of 70 per cent of the school's curriculum is offered in

[47] Quebec, *National Assembly*, 39th Legis, 1st Sess, (19 October 2010).
[48] Quebec, *Regulation respecting the criteria and weighting used to consider instruction in English received in a private educational institution not accredited for the purposes of subsidies*, C-11, r. 2.1, s. 73.1.

English. All schools that offer a French immersion program where less than 60 per cent of the student body has a certificate of eligibility are classified as type 'C' institutions. Type 'C' institutions are further broken down into three categories: 'C1' (less than 25 per cent of students have eligibility certificates), 'C2' (between 26 and 40 per cent of students have eligibility certificates) and 'C3' (between 41 and 59 per cent of students have eligibility certificates). Educational institutions that do not meet the criteria for type 'A' or 'C' automatically fall into the type 'B' category. There are three subcategories for type 'B' institutions: B1, B2 and B3. The same percentages listed for C1, C2 and C3 schools apply to B1, B2 and B3 schools, respectively.[49]

For division 1, students must be enrolled in type 'A' institutions for a minimum of three years to be awarded 15 points. For 'B2' and 'B3' schools, students must have completed a minimum of seven years in order to attain sixteen and twenty-one points, respectively. However, students enrolled in schools classified as 'B1' must complete a minimum of seven years to receive thirteen points – two points shy of the required fifteen. The breakdown for type 'C' schools is as follows: C1 schools require a minimum of seven years for 8 points; C2 schools require a minimum of seven years for 11 points; and C3 schools require a minimum of seven years for 14 points. It is important to note, however, that up to five points are awarded for special needs students who suffer from some type of learning or physical disability.[50] In *Solski*, the Court urged the Minister of Education to consider whether the student suffered from any learning impairments that may place them at a comparable disadvantage when compared to their peers. In this respect, the regulations comply with *Solski*.

[49] Quebec, *Regulation respecting the criteria and weighting used to consider instruction in English received in a private educational institution not accredited for the purposes of subsidies*, C-11, r. 2.1, s. 73.1.
[50] Quebec, *Regulation respecting the criteria and weighting used to consider instruction in English received in a private educational institution not accredited for the purposes of subsidies*, C-11, r. 2.1, s. 73.1.

Division 2 (‘consistent, true commitment) considers two factors, namely the number of years the applicant and/or their sibling(s) spent in a French institution. For each year that a child spends in a French elementary school, three points are deducted; if the child spends more than two years in a French school, five points are deducted for each additional year. For secondary students, the applicant is penalized five points per year; if the applicant is enrolled in a French school for more than two years, eight points are deducted per additional year. Division 2 also considers the number of years the applicant’s sibling(s) were enrolled in a type ‘A’ educational institution. A maximum of twenty points are awarded to applicants whose sibling(s) spent more than nine years in these schools. However, no additional points are awarded for students whose sibling(s) were enrolled in any type ‘B’ or ‘C’ schools. Applicants are also penalized if their sibling previously attended a French institution. The point scale ranges between -2 points (maximum 1 year in a French school) and -30 points (9 or more years in a French school). Moreover, under division 3 (‘specific situation and overall education’), families are interviewed and are assigned a score ranging between -8 and +8 points. Points are awarded based off of the interviewee’s assessment of the authenticity of the applicant’s commitment to the minority language.[51]

To summarize, applicants are given points based on the three divisions and, in order to be *eligible* to apply to receive public instruction in English, students must receive a minimum score of 15 points. Generally speaking, the point system, particularly for divisions 1 and 2, are based primarily on the number of years that the applicant, and, if applicable, their sibling(s), attended an English and/or French educational institution. In *Solski*, the Supreme Court maintained that a strictly mathematical or quantitative approach to the ‘major part’ requirement

[51] Kelly 2018, 264; Quebec, *Regulation respecting the criteria and weighting used to consider instruction in English received in a private educational institution not accredited for the purposes of subsidies*, C-11, r. 2.1, s. 73.1.

was unconstitutional. The McLachlin Court further suggested that in the in the event that a child completes the first half of their primary education in French (for example, grades 1 through 3), and the second half of their primary education in English (for example, grades 4 through 6), that these students "have formed a sufficient link with the minority language community," and, as a result, have a right to receive their education in English in Quebec.[52] Furthermore, in *Solski*, the Court claimed that the Minister of Education should also "consider what education came first."[53] The fact remains, however, that under the new regulations, students are penalized for having attended a French primary and/or secondary school, even if they did so for a brief period of time. Moreover, the new regulations do not consider the amount of time that has elapsed since the student was enrolled in French school, nor does it consider the sequence of enrollment – for example, whether the child was first educated in French or in English.

Related also is the fact that students attending 'B2' or 'B3' private English schools must be enrolled for at least seven years in order to meet the 15-point weighted score. In *Solski*, the Court maintained that attendance at a private English educational institution for short periods of time would not constitute as having demonstrated an authentic commitment to the minority language.[54] While the Supreme Court did not specify a specific cutoff point, it is highly unlikely that the Court expected applicants to spend more than half of their primary and/or secondary school education in a private English school in order to qualify for public instruction in English.

A second point worth mentioning is that division 3 grants the Minister of Education wide latitude in determining whether or not attendance at a particular unsubsidized private school demonstrates a 'genuine commitment' to an English educational pathway. More specifically, scores are assigned based off of the interviewee's *subjective opinion* as to whether or not the

[52] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R 201 at para 37.
[53] Ibid., at para 42.
[54] *Nguyen v. Quebec (Education, Recreation and Sports)*, [2009] 3 S.C.R. 208 at para 29.

student enrolled in an approved educational institution with the sole purpose of circumventing minority-language education laws in Quebec.[55] However, in *Solski*, the Supreme Court maintained that if "children are in a recognized education program regularly and legally, they will in most cases be able to continue their education in the same language."[56] Division 3 conflicts with the Supreme Court's decision in *Solski* insofar as it leaves open the possibility that, even if a child is enrolled in a private English school 'regularly and legally,' they may nonetheless be denied a certificate of eligibility on the grounds that the Minister of Education believes the child was enrolled in a bridging school for the *sole purpose* of creating a fictitious educational pathway.

Furthermore, the point system for divisions 1 and 2 are heavily biased in favour of students enrolled in type 'A' institutions. Stated differently, type 'A' schools are the "surest path to fifteen points."[57] Typically, however, type 'A' schools tend to be prestigious educational institutions with abnormally high yearly tuition fees. The Catégories des établissements privés non-subventionnés (EPNS) for the 2018-19 school year, for example, demonstrates that only four schools – namely, St-Georges, Lower Canada College, Sterling Education and the Section (secondary school) – qualified as type 'A.'[58] With the exception of Sterling Education, all of the schools average between $21, 000 and $23, 000 per academic year. Recall that in order to meet the 15-point threshold, students must be enrolled in a type 'A' school for a minimum of three years. Assuming that the child (or their sibling(s)) were not previously enrolled in a French educational institution, it would cost approximately $66, 000 to be eligible to simply *apply*.

[55] Kelly 2018, 264.
[56] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R 201 at para 47.
[57] Kelly 2018, 263.
[58] Quebec, Catégories des établissements privés non subventionnés (EPNS), 2018-19.

What this suggests is that type 'A' schools will generally be financially inaccessible to middle and lower class families, thus preventing them from applying for certificates of eligibility. While the EPNS ranking varies from year to year, a review of EPNS lists for previous schools years suggests that type 'A' schools tend to have some of the highest tuitions in the province, and tend to be located in predominantly Anglophone neighborhoods in Montreal, such as the Westisland and Westmount. As Kelly (2018) rightfully argues, this finding "strongly suggests that [type 'A' schools] may not be accessible for Allophones."[59] It can also be argued that students enrolled in type 'A' schools typically come from wealthy families who have the finances to permit their children to complete their education in these institutions. In other words, it is likely that those most likely to benefit from the new regulations have no desire, nor intent, to transfer their children to public schools. It appears, therefore, that with the notable exception of families who can "buy their children and their descendants a right to publicly funded English schooling," Bill 115 and the corresponding regulations effectively prohibit the use of bridging schools in Quebec.[60]

To reiterate, while attending a type 'A' institution significantly increases ones chances of being granted a certificate of eligibility, there is no guarantee that this will be the outcome. The truth of the matter is that in order to *qualify to apply* for a certificate of eligibility – let alone be granted the certificate – the applicant must first earn fifteen points. As we have seen, the chances of meeting this requirement are highly unlikely. Even if a student meets the fifteen-point threshold, there is still the very real possibility that the Minister of Education will nonetheless refuse the application. Bill 115, properly understood, reintroduces a near complete ban on bridging schools (the central issue in *Nguyen*), and restores the quantitative approach to the

[59] Kelly 2018, 264.
[60] Richez 2014, 227-28.

'major part' requirement (the central issue in *Solski*). For these reasons, the regulations can be properly described as legislative noncompliance.

Having considered the Quebec government's legislative response to *Solski* and *Nguyen*, the remaining of the chapter details some of the broader implications of Bill 115 with respect to judicial power and policy impact post-*Charter*. In so doing, it highlights some of the existing limitations in the judicialization of politics literature in Canada.

5.7 Judicial Impact and Minority Language Education in Quebec

A common narrative in the judicial policymaking literature in Canada is that the Supreme Court behaves as a powerful policymaking institution.[61] To some degree, this is true. Section 24(1), the remedial provision of the *Charter*, grants certain courts wide latitude in determining how to remedy rights violations. By entrusting the courts with the power to review legislation for its consistency with the *Charter*, it places the Supreme Court "at centre stage in some of Canada's most dramatic [and contentious] policy debates."[62] This was the case in *Solski* and *Nguyen*, where the Supreme Court was asked to determine whether the quantitative approach to the 'major part' requirement and the blanket prohibition on bridging schools in Quebec infringed section 23 *Charter* rights. In both cases, the McLachlin Court invalidated Quebec's minority-language education laws on the basis that they unjustifiably infringed on section 23 of the Canadian *Charter of Rights and Freedoms*. The Supreme Court chose to invalidate Bill 86 and 104, despite recognizing that doing so would significantly impair Quebec's capacity to legislate in a policy area crucial to preserving its linguistic and cultural distinctiveness. In this respect, the Court's power is uncontestable.

[61] Monahan 2001, 387; Kelly 2005, 35; Morton 1992, 627; Morton and Knopff 2000, 22.
[62] Songer 2008, 6.

A common misconception in the judicialization of politics literature, however, is that, "short of invoking the notwithstanding clause," the legislatures cannot reverse or modify unpopular judicial rulings.[63] This creates the false impression that the legislatures have no other choice but to comply with the Supreme Court. Bill 115 (and the relevant regulations) suggests that this may not the case. Here, it is important to remember that the section 23 *Charter* rights are immune from the legislative override, yet *Solski* and *Nguyen* nonetheless witnessed strong legislative responses. The bottom line is that, in Canada, formal channels of disagreement, such as section 33, are but one option available to the legislatures in choosing *how* and *when* to respond to judicial invalidation.

Moreover, a review of Bill 115 and its corresponding regulations suggests that judicial power is not absolute. The truth of the matter is that judicial invalidation often marks the beginning of a constitutional dialogue between the legislatures and the Court. While the Supreme Court of Canada has the power to remedy rights violations, it is fundamentally up to the legislatures in choosing whether or not to introduce an independent legislative response to address judicial invalidation. As the designers and implementers of public policy, the Quebec government had two options at their disposal: comply with the Court (negative dialogic sequel), or challenge the Court (positive dialogic sequel). These two options have fundamentally different implications for judicial power and policymaking. When the provincial legislature complies with judicial rulings, they treat the Supreme Court's ruling as final and authoritative. In these cases, therefore, the Supreme Court behaves as a powerful policymaking institution. Conversely, when they challenge the Court by ineffectively implementing judicial decisions, or by outright

[63] Kelly (In progress), 13.

ignoring judicial directives, the legislature is in a position to constrain the Court's policymaking power.[64]

As we have seen, Bill 115 and its corresponding regulations are clear examples of 'in your face' (or positive) legislative responses that defy the spirit of the Supreme Court's ruling in *Solski* and *Nguyen*. In particular, the Charest government's legislative response effectively reintroduced the provisions of the *Charter of the French Language* deemed to be unconstitutional by the Court. For example, the regulations ensure that relatively few, if any, Canadians will be eligible to apply for certificates of eligibility, in effect reintroducing a near complete ban on bridging schools in Quebec. It also defies the Supreme Court's ruling by reintroducing a quantitative approach to ascertaining the 'major part' requirement, which is based heavily on the number of years spent at an English and/or French educational institution. Accordingly, Bill 115 can be properly classified as legislative noncompliance, or as a positive dialogic sequel introduced in response to judicial invalidation.

This decision, however, is not surprising. Both cases dealt with lateral policy issues that required that the Quebec legislature comply with, and implement, the Court's rulings. Perhaps more importantly, and unsurprisingly, both cases proved to be unpopular with the Charest government. As previously suggested, Quebec governments, irrespective of party affiliation, have historically been hostile to the idea of letting the Supreme Court of Canada call the policy shots. This is especially true of cases dealing with minority-education language laws in Quebec, a policy area that the Quebec government has a strong political attachment to. Consistent with Hall's (2010) theory of the Supreme Court of Canada as an 'implementer-dependent' institution, this suggests that, under certain conditions – namely, when *Charter* cases involve unpopular

[64] Macfarlane 2012, 44; Macfarlane 2018, 11.

lateral issues – the Court's power will be offset by the legislature's unwillingness to comply with, and thus implement, the judicial decisions.

The crucial point here is that, despite the Supreme Court's 'strong-type' decisions in *Solski* and *Nguyen*, relatively little has changed with respect to minority-language education laws in Quebec. While the Supreme Court's decision in *Solski* and *Nguyen* "made it more difficult for Quebec to further the multinational character of Canadian citizenship,"[65] it did not result in fundamental policy change. This is because, in both cases, the Supreme Court of Canada lacked the political support necessary to "bring their decisions to life."[66] Put simply, despite a series of legal victories in favor of the Allophone and Anglophone communities in Quebec, the policy impact of the Court post-*Solski* and *Nguyen* was rather limited.

5.8 Conclusion

The chapter reviewed two cases involving minority-language education rights in Quebec – *Solski* (2005) and *Nguyen* (2009). It also analyzed the legislative response to both cases, namely Bill 115 and the corresponding regulations. In doing so, this chapter has sought to demonstrate that despite the Court's remedial activism, i.e., the invalidation of Bill 86 (*Solski*) and Bill 104 (*Nguyen*), little changed with respect to minority-language education laws in Quebec. Properly construed, Bill 115 is a classic example of legislative defiance, or as a positive legislative sequel to address judicial invalidation.

This is seen in the fact that under the new regulations, the 'major part' requirement is still heavily based on the number of years that an applicant spends in a French and/or English school, which the Court maintained was unconstitutional in *Solski*. Similarly, the new regulations ensure

[65] Richez 2014, 230.
[66] Rosenberg 2008, 26.

that relatively few applicants, if any, will meet the eligibility requirements, thus effectively banning the use of bridging schools in Quebec. Once again, this conflicts with the Court's finding in *Nguyen* that a blanket prohibition on bridging schools was unconstitutional. As this chapter has demonstrated, the new regulations favor students attending type 'A' institutions – educational institutions that are financially inaccessible for a majority of Canadian families. Moreover, applicants are required to receive a weighted score of 15 points in order to be eligible to apply. This does not guarantee, however, that the Minister of Education will grant these applicants a certificate of eligibility. In other words, Bill 115 has the exact same effect as Bill 86 and 104, which had been previously struck down by the McLachlin Court: to contain the existing Anglophone community by ensuring that all newcomers are educated in French in Quebec.

As this chapter has demonstrated, the *Charter of Rights and Freedoms* has always been unpopular among French Quebecers and the Quebec National Assembly, more specifically. What this suggests is that the Supreme Court's decision in *Solski* and *Nguyen* was fundamentally at odds with the Quebec government's policy objective of preserving the French language and culture, therefore explaining why the final outcome was legislative noncompliance.

Thus, and contrary to the position advanced by right-wing judicial critics, this demonstrates that judicial activism often marks the beginning of an interinstitutional dialogue between the Court and the federal or provincial legislatures. Bill 115 attests to the claim that the Court's remedial activism rarely precludes provincial or federal legislatures from introducing independent legislative responses to address judicial invalidation. It also suggests, however, that conservative critics have exaggerated the extent of judicialization in Canada, and the power and policy impact of the Supreme Court post-*Charter*. While the Supreme Court plays an important role as 'agenda-setters,' they lack the power to implement their decisions outside of the

courtroom. Despite the Court's multiple attempts to judicialize minority-language education policy in Quebec, the invalidation of Bill 86 and 104 did not result in "consequential policy change."[67]

[67] Kelly 2018, 265.

6

Conclusion: McLachlin's 'Legacy'

The thesis project reviewed six cases involving salient and controversial issues of public policy where the McLachlin Court invalidated primary legislation (statutes) for its inconsistency with either the Quebec (*Chaoulli*) or the Canadian *Charter*. The six cases involved three core policy areas of federal or provincial jurisdiction, including criminal justice (*Bedford* and *PHS Community* in chapter 3), health (*Chaoulli* and *Carter* in chapter 4) and minority-language education policy in Quebec (*Solski* and *Nguyen* in chapter 5). Utilizing dialogue theory as the analytical framework, complemented with a modified approach to Matthew Hall's theory of the Supreme Court of Canada as an 'implementer-dependent' institution, the thesis project sought to measure the policy impact and clout of the McLachlin Court (2000-2017), and to explore the conditions under which the Supreme Court behaves as a powerful policymaking institution. More specifically, it analyzed legislation introduced by Parliament or the Quebec legislature in response to judicial invalidation in an attempt to understand whether (and to what extent) the Court's *Charter* decisions influenced the design and implementation of public policy.

With the sole exception of *Chaoulli*, all of the cases under review were unanimous decisions delivered by the Supreme Court, two of which (*Carter* and *Solski*) were authored by 'The Court.' Habitually, unanimous or 'strong-type' judicial decisions resulting in statutory invalidation rarely witness positive legislative responses because they are often perceived to be authoritative, final and legally binding on government.[1] The expectation, therefore, is that federal and/or provincial legislatures will not respond in these cases, or, in the event that they do, they will most likely introduce negative dialogic sequels reflective of legislative compliance.

[1] McCormick 2005, 5; Macfarlane 2010, 401; Mathen 2003, 325 & 327.

Important also is the fact that cases involving *Charter* rights rarely result in unanimous decisions because they often deal with complex and controversial policy issues, and thus welcome dissent. Arguably, therefore, when the Supreme Court delivers unanimous decisions on inherently divisive issues, such as those chosen for the purposes of the case studies, their primary objective is to ensure that the decision is unambiguous and will therefore be complied with.[2]

While *Chaoulli* was a split decision (4:3), its 'strong-type' features also leave the impression that the majority sought to do everything in its power to ensure that the decision would be complied with. In effect, the majority based their decision on the Quebec *Charter of Human Rights*, as opposed to the Canadian *Charter of Rights and Freedoms*. The justification for doing so was that the former had a "broader purpose," implying that section 15 of the *Health Insurance Act* and section 11 of the *Hospital Insurance Act* would be at an increased risk of being invalidated.[3] It is also likely that this choice stems from the majority's recognition that the judicial decision "would have greater legitimacy if it were founded principally on a rights-based document emanating from that province," especially given that the Canadian *Charter* has never been popular in Quebec.[4] For these reasons, *Chaoulli* can also be classified as a 'strong-type' judicial decision.

In all six cases under review, we witnessed the McLachlin Court attempt to judicialize politics, albeit to varying degrees. Stated differently, we witnessed the Supreme Court of Canada dive into controversial and salient issues of public policy, despite lacking the institutional expertise required to properly evaluate and debate these issues. Nonetheless, the responsible federal or provincial legislatures responded to each judicial decision by introducing positive dialogic sequels, in spite of the fact that the Supreme Court's decisions appeared to leave little

[2] Mathen 2003, 322, 324 & 332.
[3] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at para 25.
[4] Bateman 2006, 321.

room for independent legislative responses. Indeed, if one considers the outcome of the cases alone, it appears that the Supreme Court under Beverly McLachlin's leadership behaved as a powerful policymaking institution. A textual analysis of the legislative responses introduced to address judicial invalidation, however, suggests otherwise.

Chapter three, for example, has shown that in *Bedford* and *PHS Community*, the Supreme Court sought to liberalize access to safe injection facilities (SIFs) in Canada, and attempted to normalize prostitution and create safer working conditions for sex workers, respectively. In response to *Bedford* and *PHS Community*, the Harper Conservatives – a government who had openly vocalized its preference for 'crime-reduction' approaches – introduced equally strong legislative responses that explicitly defied the Supreme Court's rulings. A review of Bill C-2 (*PHS Community*) demonstrated that, contrary to the Supreme Court, the Harper Conservatives preferred to limit the prospect of expanding SIFs to other jurisdictions facing similar drug addiction problems as that experienced in the Downtown Eastside. In effect, Bill C-2 introduces twenty-six conditions that must be met before safe injection facilities are eligible to apply for an exemption under the *CDSA*, thus making it virtually impossible for any SIF to operate free from criminal prosecution. The fact that not a single safe injection facility, other than Insite, was granted an exemption by the federal Minister of Health post-Bill C-2 confirms this.

Similarly, Bill C-36 reintroduces, albeit with some minor modifications, the prostitution-related provisions invalidated by the McLachlin Court in *Bedford*. In particular, the 'material benefit' and 'advertising' provisions of Bill C-36 render it relatively difficult, borderline impossible, for sex workers to hire staff such as bodyguards and receptionists, to work in the same location as other sex workers, or to advertise on behalf of their colleagues. Arguably, this has the effect of exacerbating the potential safety and health risks associated with the sex trade,

one of the primary reasons the Supreme Court struck down the prostitution-related provisions of the *Criminal Code* to begin with. Additionally, while the 'communicating' provision no longer makes it a criminal offence for sex workers to solicit their own work in public spaces, Bill C-36 now makes it a criminal offence to purchase sex. As the chapter demonstrated, this not only has potentially harmful effects on the economic livelihood of sex workers, but it also increases the risk that sexual transactions will take place in more secluded or remote areas out of fear that 'sex purchasers' will be convicted under the *Criminal Code*. For these reasons, Bill C-36 is a classic example of a positive dialogic sequel.

Chapter four reviewed two cases involving healthcare policy, including *Chaoulli* (private health insurance in Quebec) and *Carter* (medical assistance in dying). In both cases, the McLachlin Court attempted to judicialize healthcare policy by transforming legal rights into health rights. While neither the Quebec nor Canadian *Charters* include a health rights provision, a unanimous Court in *Carter*, and a slim majority in *Chaoulli*, found that the absolute prohibition on physician-assisted death violated the Canadian *Charter*, and that the ban on private health insurance violated the Quebec *Charter*, respectively. As the chapter demonstrated, however, the Court's decisions proved to be unpopular with the actors responsible for implementing these judicial decisions, which ultimately constrained the McLachlin Court's capacity to launch fundamental policy reform.

In the context of *Carter*, the chapter showed that while Bill C-14 complies in some respects with the Court's decisions, it also has features of legislative noncompliance. For instance, Bill C-14 legalizes physician-assisted death in Canada for persons who are 'grievously and irremediably' ill, and thus complies with *Carter*. To a certain degree, this outcome was to be expected given that the Trudeau Liberals have positioned themselves to be much more 'Court

friendly' than the Harper Conservatives, and thus more likely to introduce negative dialogic sequels to address judicial invalidation. To be eligible for medical assistance in dying, however, Bill C-14 also requires that the patient's medical condition have deteriorated significantly, and that the applicant's natural death be "reasonably foreseeable."[5] Recall that the Supreme Court did not consider these two criteria. The effect of Bill C-14, therefore, is that less people will be eligible for PAD than would have otherwise been the case had the Trudeau Liberals fully complied with *Carter*.

The chapter has also shown that cases involving multiple non-judicial 'implementers,' such as *Carter*, "complicates matters" because they often require that one actor "acknowledge the legality of the action" (in this case, the federal government), while also requiring that another actor "ensure access to the services" (in this case, provincial medical associations and healthcare professionals).[6] This suggests that doctors who conscientiously object to physician-assisted death – in other words, medical professionals who, for moral or religious reasons, refuse to assist eligible candidates in prematurely terminating their lives – serve as an additional barrier to MAID.

In effect, *Carter* dealt with a negative right, or the right not to have government interfere with a person's choice to receive medical assistance in dying. It did not, however, concern the positive right to receive this assistance. This suggests that Canadian healthcare professionals cannot be forced into providing MAID, and, as we have seen, the available evidence suggests that a majority of doctors refuse to aid patients in terminating their lives, even in cases where the patients are eligible under Bill C-14.[7] Put simply, the Trudeau Liberals and Canadian healthcare professionals, the actors responsible for enforcing the judicial decision, fundamentally disagreed

[5] Canada, Parliament, *House of Commons Debate*, 42nd Parl, 1st Sess, (17 June 2016).
[6] Kelly (In progress), 27.
[7] Ross and Sikkema 2016.

with the outcome at trial, or, at the very least, certain aspects of the Court's decision, and have thus failed to fully implement the judicial decision. The truth of the matter is that there is virtually little to no difference between the state of physician-assisted death in Canada pre- and post-Bill C-14; without the compliance of healthcare professionals, relatively few will be able to exercise their right to PAD, even though it is now technically legal in Canada.[8]

Similarly, in response to *Chaoulli*, the Quebec government enacted Bill 33, which reintroduced a near complete ban on private health insurance. With the sole exception of knee, hip and cataract surgeries, Bill 33 prohibits Quebecers from buying private health insurance for medically-necessary procedures already covered and offered in the public healthcare system. Arguably, this choice was motivated by the Quebec National Assembly's unwillingness to create conditions favorable to the expansion of a duplicate private healthcare market in Quebec. Given the relatively low number of admissible procedures and, as a result, the small pool of applicants eligible for private insurance, Bill 33 offers little to no incentives for private insurers to operate in Quebec.[9] The outcome, therefore, is that little changed with respect to privatization of healthcare insurance, or long wait-times in Quebec post-*Chaoulli*, despite the Court's finding that the privatization ban violated the Quebec *Charter*.

Chapter five reviewed two cases involving minority-language education rights: *Solski* and *Nguyen*. In *Solski*, in a unanimous decision authored by 'the Court,' the SCC found that the 'major part' requirement (or the purely quantitative approach) used by the Minister of Education to ascertain whether or not applicants were eligible to receive their education in a public English school in Quebec was unconstitutional. In *Nguyen*, the Court found that the absolute prohibition on bridging schools violated section 23(1), the minority-language education provision of the

[8] Macfarlane 2016, 121.
[9] Labrie 2015; See also Manfredi and Maioni 2018, 112.

Charter. Uncontestably, both of these cases proved to be unpopular with the actors responsible for enforcing the Supreme Court's decision, the Quebec National Assembly. In Quebec, the *Charter of Rights* has never been popular. Perhaps more importantly, minority-language education policy in Quebec has always been perceived to be a crucial policy area for preserving the province's linguistic and cultural distinctiveness;[10] historically, the Quebec National Assembly has always had a strong political attachment to minority-language education policy.

It is not surprising, therefore, that in response to *Solski* and *Nguyen*, the Charest government introduced Bill 115. As the chapter demonstrated, Bill 115 initially appears to be a negative dialogic response. However, a textual review of the corresponding regulations demonstrates that Bill 115 can be properly classified as legislative noncompliance. In order to be eligible to simply apply for minority-language education, let alone be granted the certificate, Bill 115 requires that applicants first obtain a minimum weighted score of 15 points. For divisions 1 ('schooling') and 2 ('consistent, true commitment') of the regulations, points are awarded based on the number of years that the applicant and, if applicable, their siblings, attended an English school. Likewise, students are penalized depending on the number of years they (or their siblings) attended a French school. In effect, Bill 115 reintroduces the quantitative approach deemed to be unconstitutional by the McLachlin Court in *Solski*.

The regulations also reintroduce a near complete ban on the use of bridging schools in Quebec. Bill 115 is heavily biased in favour of type 'A' institutions, which also happen to be English private schools with some of the highest yearly tuition fees in Quebec, and tend to be located in predominantly Anglophone neighborhoods. This not only suggests that type 'A' educational institutions may be financially inaccessible for middle- and lower-class families, it

[10] Richez 2014, 192.

also suggests that these schools "may not be accessible for Allophones."[11] In short, the regulations have the effect of reintroducing a near complete ban on bridging schools, save for students with the financial means required to attend type 'A' institutions.

Taken collectively, these six case studies have addressed two limitations in the existing literature on judicial power and the Court's policy influence. For starters, it has demonstrated that conservative critics have mistakenly assumed that, because the Supreme Court of Canada plays a more important and direct policy role post-1982 than ever before in the history of the institution, and because they have occasionally struck down primary legislation for violating protected rights, that this automatically results in fundamental policy change. Undeniably, the inclusion of a strong remedial provision in the *Charter* (section 24(1)) empowers the Court as 'agenda-setters.' By its very nature, judicial invalidation forces issues onto legislative agendas, which may not have otherwise been debated in Parliament or provincial legislative assemblies. To some degree, therefore, the Court behaves as a powerful policymaking institution.[12]

The common mistake, however, is to equate judicial invalidation (or agenda-setting) with the capacity to influence public policy outcomes. As the thesis has demonstrated, this is not always the case. As an 'implementer-dependent' institution, the Supreme Court of Canada's policy clout is contingent on whether the judicial decision involves a vertical (where judicial actors are tasked with implementing the Court's ruling) or lateral policy area (where non-judicial actors are required to implement the Court's ruling), and, in the case of the latter, whether the decision is popular.[13]

The fact remains that different types of dialogic responses have different implications for judicial power and policymaking. The Supreme Court behaves as a powerful policymaking

[11] Kelly 2018, 264.
[12] Kelly (In progress), 7-8.
[13] Hall 2010, 15-8.

institution in cases where the federal and/or provincial legislatures introduce negative dialogic responses, or fail to respond altogether. This is because the legislatures allow the Court, by default, to dictate public policy outcomes. The same is not true, however, of positive dialogic responses where the responsible legislature introduces reply legislation that significantly departs from the directives of the Court, and which remains committed to the original policy objectives.

Additionally, the thesis demonstrated that when the Supreme Court delivers unpopular decisions involving lateral policy issues, specifically when such cases deal with controversial and important issues of public policy, there is a much greater risk that the legislative response will be noncompliance. In all six cases under review, the McLachlin Court issued decisions that conflicted with the policy objectives of the responsible legislature, thus explaining why they responded by introducing positive dialogic sequels. The bottom line is that the Supreme Court of Canada lacks the tools required to enforce their decisions outside of the courtroom, suggesting that they cannot compel either the federal or provincial legislatures to introduce reply legislation that complies with their decisions.[14] The extent of the Court's policy influence, therefore, rests on the popularity of the judicial decision, and the degree of deference that the federal and/or provincial legislatures are willing to grant to the Court.

A second limitation has been the heavy focus on 'formal channels of disagreement,' such as sections 1 (the reasonable limits provision) and 33 (the notwithstanding clause) of the *Charter*.[15] In so doing, scholars have overlooked the 'non-formal' alternatives available to the legislatures to interact or respond to unpopular Supreme Court decisions. In all six cases under review, we witnessed the responsible legislature introduce positive legislative responses to counteract judicial invalidation, without resorting to the use of the notwithstanding clause. This

[14] Rosenberg 2008, 26.
[15] Kavanagh 2015, 1010 & 1038; See also Kelly (In progress), 13.

seems to confirm dialogue theorists' assertion that judicial invalidation often leaves room for the federal and/or provincial legislatures to introduce an independent legislative response that significantly departs from the Court's directives.[16] This remains true even in the context of the most forceful, authoritative or 'strong-type' decisions delivered by the Supreme Court of Canada that may initially appear to preclude any possibility of introducing independent legislative responses.

To reiterate, all six cases under review can be classified as 'strong-type' judicial decisions that resulted in the invalidation of primary legislation in core policy areas of provincial and federal jurisdiction. Stated differently, they are clear examples of federal or provincial governments losing significant *Charter* 'battles.' Nonetheless, all six cases were followed by equally strong (if not stronger) legislative responses that either did not comply altogether, or ineffectively implemented, the judicial rulings. Despite losing in the courtroom, the federal and provincial governments, as the designers and implementers of public policy in response to judicial invalidation, crafted reply legislation that allowed them to "win the policy 'war.'"[17] Indeed, a textual review of the legislative responses demonstrates that the policy status quo has not changed drastically with respect to physician-assisted death, prostitution reform, safe injection facilities, private health insurance and minority-language education policy in Quebec, despite the McLachlin Court's best attempts to behave as a powerful policymaking institution via its remedial activism. This suggests that the policy influence and impact of the McLachlin Court was rather limited.

Despite its contributions, the thesis suffers from a number of limitations. First, the relatively low number of case studies conducted provides only a partial picture of judicial power

[16] Hogg, Bushell-Thornton and Wright 2007, 45.
[17] Kelly (In progress), 31.

and the judicialization of politics during the McLachlin era. Future studies could use a similar analytical framework as that which was developed in the thesis in an attempt to understand whether the study's findings apply to other *Charter* cases involving unpopular lateral issues. In other words, they can use Hall's (2010) theory of final appellate courts as 'implementer-dependent' institutions to understand how, given the right set of circumstances, even the most forceful judicial decisions can be counteracted by the federal and/or provincial government's unwillingness to create conditions hospitable to the judicialization of politics.

A second limitation is that the study exclusively analyzed cases involving primary legislation. Given the study's focus on the policy impact of the McLachlin Court, however, the exclusion of secondary legislation, conduct cases and reference questions was justified. Nonetheless, future studies can build off of the findings of the present research by exploring whether similar patterns of legislative noncompliance exist in the context of unpopular lateral cases involving judicial invalidation of secondary legislation. This would arguably provide a more complete picture of judicial power and the Supreme Court's policy impact post-introduction of the Canadian *Charter of Rights and Freedoms*.

A final limitation is that the chapter on criminal justice policy focused on two cases involving judicial invalidation during the Harper era, thus giving the impression that the findings are biased. The truth, however, is that the Harper government was in power for nearly a decade. That is to say, they served as the incumbent government for a majority of the years that Beverly McLachlin served as Chief Justice of the Supreme Court of Canada. At least with respect to *Charter* cases involving criminal justice policy invalidated by the McLachlin Court, therefore, future work will, generally speaking, also focus heavily on legislative responses introduced by the Harper Conservatives.

Related also is the fact that the cases involving provincial areas of jurisdiction (*Chaoulli*, *Solski* and *Nguyen*) were cases involving the Quebec government. As Appendix 3 demonstrates, however, there were only eight cases where the responsible provincial government introduced legislation in response to judicial invalidation during the McLachlin era. Three of these eight cases involved the Quebec government, which also happen to be the only cases involving two core areas of provincial jurisdiction – health and education policy. In other words, the three provincial cases were selected based off of the fact that they deal with some of the most controversial and salient policy issues reviewed by the McLachlin Court.

In spite of its limitations, the present study contributes to the judicialization literature in Canada by demonstrating that the federal and/or provincial legislatures can constrain judicial power via legislative noncompliance. Importantly, the findings of the present research can serve to incentivize scholars to move beyond legal mobilization studies, and, instead, to understand how and when legislatures react to judicial invalidation, and what this means for judicial power and the Supreme Court's policy clout.

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Appendix 1 (McLachlin Court's *Charter* Docket)

#	***Case***	***Year***	***Charter Challenge***
1	*Ernst v. Alberta Energy Regulator*	2017	Primary legislation
2	*B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*	2017	Primary legislation
3	*R. v. Paterson*	2017	Police conduct
4	*R. v. Peers*	2017	Judicial conduct/decision
5	*Lajeunesse (Re)*	2017	Judicial conduct/decision (Question is moot)
6	*R. v. Hunt*	2017	Judicial conduct/decision
7	*R. v. Antic*	2017	Primary legislation
8	*R. v. Cody*	2017	Trial delay
9	*India v. Badesha*	2017	Minister of Justice conduct/decision
10	*Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resources Operation)*	2017	Ministerial conduct/decision
11	*Association of Justice Counsel v. Canada (Attorney General)*	2017	Employer imposing workplace policy
12	*R. v. Marakah*	2017	Police conduct
13	*R. v. Jones*	2017	Police conduct
14	*R. v. Boutilier*	2017	Primary & judicial conduct/decision
15	*R. v. Gagnon*	2016	Police conduct
16	*R. v. Safarzadeh-Markhali*	2016	Judicial conduct/decision (sentencing)
17	*R. v. Lloyd*	2016	Primary & Judicial conduct/decision (sentencing)
18	*Canada (National Revenue) v. Thompson*	2016	Ministerial application
19	*Canada (Attorney General) v. Chambre des Notaires du Quebec*	2016	Primary legislation
20	*R. v. Saeed*	2016	Police conduct
21	*R. v. Vassell*	2016	Trial delay (prosecutorial misconduct)
22	*R. v. Williamson*	2016	Trial delay (prosecutorial misconduct)
23	*R. v. Jordan*	2016	Trial delay (established new framework)
24	*R. v. K.R.J.*	2016	Primary legislation
25	*R. v. Cawthorne*	2016	Primary legislation
26	*R. v. Villaroman*	2016	Police conduct & court conduct/decision
27	*Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*	2016	Primary legislation
28	*R. v. Rowson*	2016	Police conduct
29	*R. v. Diamond*	2016	Police conduct
30	*British Columbia Teachers' Federation v. British Columbia*	2016	Primary legislation
31	*Mounted Police Association of Ontario v. Canada (Attorney General)*	2015	Primary legislation
32	*Meredith v. Canada (Attorney General)*	2015	Primary legislation
33	*Saskatchewan Federation of Labour v. Saskatchewan*	2015	Primary legislation

34	*Carter v. Canada*	2015	Primary legislation
35	*Canada (Attorney General) v. Federation of Law Societies of Canada*	2015	Primary & secondary legislation
36	*Loyola High School v. Quebec (Attorney General)*	2015	Secondary legislation (regulations)
37	*R. v. Sanghera*	2015	Trial delay (prosecutorial misconduct)
38	*R. v. Nur*	2015	Primary legislation
39	*Association des Parents de l'école Rose-des-Vents v. British Columbia (Education)*	2015	Judicial conduct/decision
40	*Henry v. British Columbia (Attorney General)*	2015	Prosecutorial misconduct
41	*Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*	2015	Judicial conduct/decision & School Board
42	*R. v. Kokopenace*	2015	Jury bias/partiality
43	*Kahkewistahaw First Nation v. Taypotat*	2015	Secondary legislation (Kahkewistahaw Election Code)
44	*Canada (Attorney General) v. Barnaby*	2015	Ministerial discretion
45	*R. v. Smith*	2015	Primary & secondary legislation
46	*Guindon v. Canada*	2015	Primary legislation
47	*Goodwin v. British Columbia (Superintendent of Motor Vehicles)*	2015	Primary legislation
48	*R. v. Moriarity*	2015	Primary legislation
49	*R. v. Appulonappa*	2015	Primary legislation
50	*R. v. MacDonald*	2014	Police conduct
51	*R. v. Koczab*	2014	Police conduct
52	*Canada (Attorney General) v. Whaling*	2014	Primary legislation
53	*Canada (Citizenship and Immigration) v. Harkat*	2014	Primary legislation
54	*R. v. Anderson*	2014	Crown's constitutional obligation & prosecutorial discretion
55	*R. v. Spencer*	2014	Police conduct
56	*R. v. Taylor*	2014	Police conduct
57	*R. v. Mian*	2014	Police conduct
58	*R. v. Mack*	2014	Police conduct & judicial conduct/decision
59	*R. v. Conception*	2014	Judicial conduct/decision
60	*R. v. Mohamed*	2014	Judicial conduct/decision
61	*Kazemi Estate v. Islamic Republic of Iran*	2014	Primary legislation
62	*Wakeling v. United States of America*	2014	Primary legislation & police conduct
63	*R. v. Day*	2014	Police conduct
64	*R. v. Fearon*	2014	Police conduct
65	*Quebec (Attorney General) v. A*	2013	Primary legislation
66	*Saskatchewan (Human Rights Commission) v. Whatcott*	2013	Primary legislation
67	*R. v. MacIntosh*	2013	Trial delays (prosecutorial misconduct)
68	*R. v. Levkovic*	2013	Primary legislation
69	*Divito v. Canada (Public Safety and Emergency Preparedness)*	2013	Primary legislation
70	*R. v. MacKenzie*	2013	Police conduct

71	*R. v. Chehil*	2013	Police conduct
72	*R. v. Vu*	2013	Police conduct
73	*Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*	2013	Primary & secondary legislation
74	*Canada (Attorney General) v. Bedford*	2013	Primary legislation
75	*S.L. v. Commission scolaire des Chênes*	2012	Ministerial conduct/decision
76	*Doré v. Barreau du Québec*	2012	Secondary legislation (code of ethics)
77	*R. v. Tse*	2012	Primary legislation
78	*R. v. Bellusci*	2012	Judicial conduct/decision
79	*R. v. Cole*	2012	Police conduct
80	*R. v. St-Onge Lamoureux*	2012	Primary legislation
81	*R. v. Nedelcu*	2012	Prosecutorial misconduct (evidence)
82	*R. v. Aucoin*	2012	Police conduct
83	*Sriskandarajah v. United States of America*	2012	Ministerial discretion & prosecutorial discretion
84	*R. v. Khawaja* (companion case to sriskandarajah)	2012	Primary legislation
85	*R. v. N.S.*	2012	Judicial conduct/decision
86	*Canadian Broadcasting Corp. v. Canada (Attorney General)*	2011	Secondary legislation (rules of practice & directives)
87	*R. v. Ahmad*	2011	Primary legislation
88	*Withler v. Canada (Attorney General)*	2011	Primary legislation
89	*Ontario (Attorney General) v. Fraser*	2011	Primary legislation
90	*R. v. Loewen*	2011	Police conduct
91	*Alberta v. Elder Advocates of Alberta Society*	2011	Government (inflation of prices)
92	*R. v. Campbell*	2011	Police conduct & judicial conduct/decision
93	*R. v. Nixon*	2011	Prosecutorial misconduct (plea deal)
94	*Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*	2011	Primary legislation
95	*Canada (Attorney General) v. PHS Community Services Society*	2011	Primary legislation & ministerial discretion
96	*R. v. Coté*	2011	Judicial conduct/decision
97	*R. v. Whyte*	2011	Judicial conduct/decision
98	*R. v. J.Z.S.*	2010	Trial (testimonial competence)
99	*Canada (Prime Minister) v. Khadr*	2010	Canadian intelligence services (CSIS and DFAIT); Crown actions
100	*R. v. Nasogaluak*	2010	Police conduct & judicial discretion
101	*R. v. Beaulieu*	2010	Judicial conduct/discretion
102	*R. v. Morelli*	2010	Police conduct & judicial conduct/discretion
103	*R. v. National Post*	2010	Police conduct
104	*Toronto Star Newspaper Ltd. V. Canada*	2010	Primary legislation
105	*R. v. Conway*	2010	Court conduct (*administrative tribunals)
106	*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*	2010	

			Primary legislation & Ministerial decision
107	*R. v. Nolet*	2010	Police conduct
108	*Vancouver (City) v. Ward*	2010	Court decision (damages awarded)
109	*R. v. Cornell*	2010	Police conduct
110	*R. v. Willier*	2010	Police conduct
111	*R. v. Sinclair*	2010	Court conduct
112	*R. v. McCrimmon*	2010	Police conduct
113	*Globe and Mail v. Canada (Attorney General)*	2010	Court (court order) & prosecutorial misconduct (cross-examination)
114	*R. v. Gomboc*	2010	Police conduct
115	*DesRochers v. Canada (Industry)*	2009	Court conduct/decision
116	*Ermineskin Indian Band and Nation v. Canada*	2009	Primary legislation & Crown conduct
117	*R. v. Patrick*	2009	Police misconduct
118	*R. v. Godin*	2009	Prosecutorial misconduct (trial delay)
119	*A. C. v. Manitoba (Director of Child and Family Services)*	2009	Primary legislation
120	*Greater Vancouver Transportation Authority v. Canadian Federation of Students - BC Component*	2009	Secondary legislation
121	*R. v. Suberu*	2009	Police conduct
122	*R. v. Shepherd*	2009	Police conduct
123	*R. v. Harrison*	2009	Court conduct/decision
124	*R. v. Grant*	2009	Police conduct & judicial conduct/decision
125	*Alberta v. Hutterian Brethren of Wilson Colony*	2009	Secondary legislation
126	*R. v. Bjelland*	2009	Prosecutorial misconduct (relevant info) & court conduct/decision
127	*Nguyen v. Quebec (Education, Recreation and Sports)*	2009	Primary legislation
128	*R. v. Ferguson*	2008	Court conduct/decision
129	*Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*	2008	Police conduct
130	*R. v. Kang-Brown*	2008	Police conduct
131	*R. v. A.M.*	2008	Police conduct
132	*Lake v. Canada (Minister of Justice)*	2008	Minister of Justice (discretion)
133	*R. v. D.B.*	2008	Primary legislation
134	*Canada (Justice) v. Khadr*	2008	Police conduct (CSIS) & court conduct/decision
135	*R. v. Wittwer*	2008	Court conduct/decision
136	*Charkaoui v. Canada (Citizenship and Immigration)*	2008	Police conduct (CSIS officers)
137	*R. v. Kapp*	2008	Secondary legislation
138	*Charkaoui v. Canada (Citizenship and Immigration)*	2007	Primary legislation
139	*Canada (Attorney General) v. Hislop*	2007	Primary legislation
140	*R. v. Bryan*	2007	Primary legislation
141	*British Columbia (Attorney General) v. Christie*	2007	Primary legislation
142	*R. v. Hape*	2007	Police conduct

143	*Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*	2007	Primary legislation
144	*Canada (Attorney General) v. JTI-Macdonald Corp*	2007	Primary & secondary legislation
145	*Baier v. Alberta*	2007	Primary legislation
146	*R. v. Clayton*	2007	Police conduct
147	*R. v. Singh*	2007	Police conduct
148	*Multani v. Commission Scolaire Marguerite-Bourgeoys*	2006	Council of commissioners of school board
149	*R. v. Chaisson*	2006	Police conduct & judicial conduct/decision
150	*R. v. Rodgers*	2006	Primary legislation
151	*United States of America v. Ferras; United States of America v. Latty*	2006	Primary legislation & Court conduct/decision (extradition judge)
152	*United Mexican States v. Ortega; United States of America v. Fiessel (companion to 151)*	2006	Primary legislation
153	*R. v. Krieger*	2006	Court conduct/decision
154	*R. v. Decorte*	2005	Police conduct (First Nations Constables)
155	*UL Canada Inc. v. Quebec (Attorney General)*	2005	Secondary legislation
156	*Solski (Tutor of) v. Quebec (Attorney General)*	2005	Primary legislation
157	*Gosselin (Tutor of) v. Quebec (Attorney General)*	2005	Primary legislation
158	*R. v. Chow*	2005	Police conduct
159	*Chaoulli v. Quebec (Attorney General)*	2005	Primary legislation
160	*R. v. Orbanski; R. v. Elias*	2005	Primary legislation & Police powers
161	*Toronto Star Newspaper Ltd. V. Ontario*	2005	Court conduct/decision (court orders)
162	*Medovarski v. Canada (Minister of Citizenship and immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*	2005	Court conduct/decision (appeal)
163	*Montréal (City) v. 2952-1366 Québec Inc*	2005	Secondary legislation
164	*R. v. Pires; R. v. Lising*	2005	Police misconduct (cross-examination of peace officer denied)
165	*R. v. Henry*	2005	Court decision/conduct & Crown (cross-examination)
166	*R. v. Wiles*	2005	Primary legislation
167	*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*	2004	Primary legislation
168	*Harper v. Canada (Attorney General)*	2004	Primary legislation
169	*Application Under s. 83.28 of the Criminal Code (Re)*	2004	Primary legislation
170	*R. v. Demers*	2004	Primary legislation
171	*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*	2004	Secondary legislation
172	*R. v. Mann*	2004	Police conduct
173	*Martineau v. M.N.R.*	2004	Primary and secondary legislation
174	*Newfoundland (Treasury Board) v. N.A.P.E.*	2004	Primary legislation
175	*Hodge v. Canada (Minister of Human Resources Development)*	2004	Primary legislation
176	*R. v. Tessling*	2004	Police conduct

177	*Auton (Guardian ad litem of) v. British Columbia (Attorney General)*	2004	Primary legislation
178	*Reference Re Same Sex Marriage*	2004	Reference case
179	*Siemens v. Manitoba (Attorney General)*	2003	Primary legislation
180	*R. v. P.A.*	2003	Prosecutorial misconduct (trial delay)
181	*R. v. Buhay*	2003	Police conduct & court decision/conduct
182	*Trociuk v. British Columbia (Attorney General)*	2003	Primary legislation
183	*Ell v. Alberta*	2003	Primary legislation
184	*Figueroa v. Canada (Attorney General)*	2003	Primary legislation
185	*R. v. Smith*	2003	Court conduct/decision
186	*R. v. Johnson*	2003	Court conduct/decision
187	*R. v. Edgar*	2003	Court conduct/decision
188	*Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*	2003	Primary & secondary legislation
189	*R. v. S.A.B.*	2003	Primary legislation
190	*Doucet-Boudreau v. Nova Scotia (Minister of Education)*	2003	Court conduct/decision
191	*Vann Niagara Ltd. V. Oakville (Town)*	2003	Secondary legislation
192	*Maranda v. Richer*	2003	Police conduct & court conduct/decision
193	*R. v. Taillefer; R. v. Duguay*	2003	Prosecutorial misconduct (Crown)
194	*Beals v. Saldanha*	2003	Court conduct/decision
195	*R. v. Malmo-Levine; R. v. Caine*	2003	Primary legislation
196	*R. v. Clay*	2003	Primary legislation
197	*Suresh v. Canada (Minister of Citizenship and Immigration)*	2002	Primary legislation & ministerial discretion
198	*Ahani v. Canada (Minister of Citizenship and Immigration)* (**applies framework in *Suresh*)	2002	Ministerial discretion
199	*R. v. Law*	2002	Police misconduct & court conduct/decision
200	*Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*	2002	Primary legislation
201	*R. v. Guignard*	2002	Secondary legislation
202	*R. v. Fliss*	2002	Police conduct
203	*Lavoie v. Canada*	2002	Primary legislation
204	*Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*	2002	Primary legislation
205	*R. v. Hall*	2002	Primary legislation
206	*Sauvé v. Canada*	2002	Primary legislation
207	*R. v. Noël*	2002	Prosecutorial misconduct (Crown cross-appeal)
208	*Ruby v. Canada (Solicitor General)*	2002	Primary legislation
209	*R. v. Ling*	2002	Court conduct/decision
210	*R. v. Jarvis*	2002	Ministerial discretion & court conduct/decision
211	*Quebec (Attorney General) v. Laroche*	2002	Police conduct
212	*Nova Scotia (Attorney General) v. Walsh*	2002	Primary legislation
213	*Gosselin v. Québec (Attorney General)*	2002	Secondary legislation

214	*R. v. Latimer*	2001	Court conduct/decision
215	*R. v. Sharpe*	2001	Primary legislation
216	*United States v. Burns*	2001	Ministerial discretion
217	*United States of America v. Tsioubris*	2001	Court conduct/decision
218	*United States of America v. Shulman*	2001	Court conduct/decision
219	*United States of America v. Kwok*	2001	Ministerial discretion
220	*United States of America v. Cobb*	2001	Court conduct/decision
221	*R. v. Ruzic*	2001	Primary legislation
222	*R. v. Dutra*	2001	Prosecutorial misconduct (trial delay)
223	*Therrien (Re)*	2001	Ministerial decision
224	*R. v. Pan; R. v. Sawyer*	2001	Primary legislation & secondary legislation
225	*R. v. Advance Cutting & Coring Ltd.*	2001	Primary legislation
226	*R. v. Jabarianha*	2001	Prosecutorial misconduct (Crown cross-appeal)
227	*R. v. Hynes*	2001	Court conduct/decision
228	*R. v. Golden*	2001	Police conduct
229	*R. v. 974649 Ontario Inc*	2001	Court conduct/decision
230	*Smith v. Canada (Attorney General)*	2001	Police conduct
231	*Dunmore v. Ontario (Attorney General)*	2001	Primary legislation
232	*Arsenault-Cameron v. Prince Edward Island*	2000	Ministerial discretion & French Language Board
233	*Granovsky v. Canada (Minister of Employment and Immigration)*	2000	Primary legislation
234	*Lovelace v. Ontario*	2000	Provincial discretion (casino proceeds & negotiations)
235	*R. v. Morrisey*	2000	Primary legislation & court conduct/decision
236	*Blencoe v. British Columbia (Human Rights Commission)*	2000	Human rights commission (lengthy delay)
237	*R. v. Darrach*	2000	Primary legislation
238	*Winnipeg Child and Family Services v. K.L.W.*	2000	Primary legislation
239	*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*	2000	Primary legislation

Appendix 2 (*Charter* Cases Involving Primary Legislation during McLachlin Era)

#	Case	Year	Government	Outcome
1	*Ernst v. Alberta Energy Regulator*	2017	Provincial (Alberta)	Upheld
2	*B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*	2017	Provincial (British Columbia)	Upheld
3	*R. v. Antic*	2017	Federal	Upheld
4	*R. v. Boutilier*	2017	Federal	Upheld
5	***R. v. Lloyd***	**2016**	**Federal**	**Invalidated**
6	***Canada (Attorney General) v. Chambre des Notaires du Quebec***	**2016**	**Federal**	**Invalidated**
7	***R. v. K.R.J.***	**2016**	**Federal**	**Invalidated (in part)**
8	*R. v. Cawthorne*	2016	Federal	Upheld
9	***Conference des juges de paix magistrats du Québec v Quebec (Attorney General)***	**2016**	**Provincial (Quebec)**	**Invalidated (in part)**
10	***British Columbia Teachers' Federation v. British Columbia***	**2016**	**Provincial (British Columbia)**	**Invalidated**
11	***Mounted Police Association of Ontario v. Canada (Attorney General)***	**2015**	**Federal**	**Invalidated**
12	*Meredith v. Canada (Attorney General)*	2015	Federal	Upheld
13	***Saskatchewan Federation of Labour v. Saskatchewan***	**2015**	**Provincial (Saskatchewan)**	**Invalidated**
14	***Carter v. Canada***	**2015**	**Federal**	**Invalidated**
15	***Canada (Attorney General) v. Federation of Law Societies of Canada***	**2015**	**Federal**	**Invalidated**
16	***R. v. Nur***	**2015**	**Federal**	**Invalidated**
17	***R. v. Smith***	**2015**	**Federal**	**Invalidated**
18	*Guindon v. Canada*	2015	Federal	Upheld
19	*Goodwin v. British Columbia (Superintendent of Motor Vehicles)*	2015	Provincial (British Columbia)	NEW ARP scheme; not necessary to deal with constitutionality
20	*R. v. Moriarity*	2015	Federal	Upheld
21	***R. v. Appulonappa***	**2015**	**Federal**	**Invalidated**
22	***Canada (Attorney General) v. Whaling***	**2014**	**Federal**	**Invalidated**
23	*Canada (Citizenship and Immigration) v. Harkat*	2014	Federal	Upheld
24	*Kazemi Estate v. Islamic Republic of Iran*	2014	Federal	Upheld
25	*Wakeling v. United States of America*	2014	Federal	On issue of constitutionality Court was split 3:3
26	*Quebec (Attorney General) v. A*	2013	Provincial (Quebec)	Upheld
27	*Saskatchewan (Human Rights Commission) v. Whatcott*	2013	Provincial (Saskatchewan)	Upheld
28	*R. v. Levkovic*	2013	Federal	Upheld
29	*Divito v. Canada (Public Safety and Emergency Preparedness)*	2013	Federal	Upheld
30	***Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401***	**2013**	**Provincial (Alberta)**	**Invalidated**
31	***Canada (Attorney General) v. Bedford***	**2013**	**Federal**	**Invalidated**
32	***R. v. Tse***	**2012**	**Federal**	**Invalidated**
33	***R. v. St-Onge Lamoureux***	**2012**	**Federal**	**Invalidated**

34	*R. v. Khawaja (companion case to sriskandarajah)*	2012	Federal	Upheld
35	*R. v. Ahmad*	2011	Federal	Upheld
36	*Withler v. Canada (Attorney General)*	2011	Federal	Upheld
37	*Ontario (Attorney General) v. Fraser*	2011	Provincial (Ontario)	Upheld
38	*Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*	2011	Provincial (Alberta)	Upheld
39	***Canada (Attorney General) v. PHS Community Services Society***	**2011**	**Federal**	**Overturned Minister's decision**
40	*Toronto Star Newspaper Ltd. V. Canada*	2010	Federal	Upheld
41	*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*	2010	Provincial (Ontario)	Upheld
42	*Ermineskin Indian Band and Nation v. Canada*	2009	Federal	Upheld
43	*A. C. v. Manitoba (Director of Child and Family Services)*	2009	Provincial (Manitoba)	Upheld
44	***Nguyen v. Quebec (Education, Recreation and Sports)***	**2009**	**Provincial (Quebec)**	**Invalidated**
45	***R. v. D.B.***	**2008**	**Federal**	**Invalidated**
46	***Charkaoui v. Canada (Citizenship and Immigration)***	**2007**	**Federal**	**Invalidated**
47	***Canada (Attorney General) v. Hislop***	**2007**	**Federal**	**Invalidated**
48	*R. v. Bryan*	2007	Federal	Upheld
49	*British Columbia (Attorney General) v. Christie*	2007	Provincial (British Columbia)	Upheld
50	***Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia***	**2007**	**Provincial (British Columbia)**	**Invalidated**
51	*Canada (Attorney General) v. JTI-Macdonald Corp*	2007	Federal	Upheld
52	*Baier v. Alberta*	2007	Provincial (Alberta)	Upheld
53	*R. v. Rodgers*	2006	Federal	Upheld
54	*United States of America v. Ferras; United States of America v. Latty*	2006	Federal	Upheld
55	*United Mexican States v. Ortega; United States of America v. Fiessel (companion to 151)*	2006	Federal	Upheld
56	***Solski (Tutor of) v. Quebec (Attorney General)***	**2005**	**Provincial (Quebec)**	**Invalidated (in part)**
57	*Gosselin (Tutor of) v. Quebec (Attorney General)*	2005	Provincial (Quebec)	Upheld
58	***Chaoulli v. Quebec (Attorney General)***	**2005**	**Provincial (Quebec)**	**Invalidated (Quebec Charter **)**
59	*R. v. Orbanski; R. v. Elias*	2005	Federal	Upheld
60	*R. v. Wiles*	2005	Federal	Upheld
61	*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*	2004	Federal	Upheld
62	*Harper v. Canada (Attorney General)*	2004	Federal	Upheld
63	*Application Under s. 83.28 of the Criminal Code (Re)*	2004	Federal	Upheld
64	***R. v. Demers***	**2004**	**Federal**	**Invalidated**
65	*Martineau v. M.N.R.*	2004	Federal	Upheld
66	*Newfoundland (Treasury Board) v. N.A.P.E.*	2004	Provincial (Newfoundland)	Upheld
67	*Hodge v. Canada (Minister of Human Resources Development)*	2004	Federal	Upheld
68	*Auton (Guardian ad litem of) v. British Columbia (Attorney General)*	2004	Provincial (British Columbia)	Upheld
69	*Siemens v. Manitoba (Attorney General)*	2003	Provincial (Manitoba)	Upheld
70	***Trociuk v. British Columbia (Attorney General)***	**2003**	**Provincial (British Columbia)**	**Invalidated**

71	*Ell v. Alberta*	2003	Provincial (Alberta)	Upheld
72	***Figueroa v. Canada (Attorney General)***	**2003**	**Federal**	**Invalidated**
73	***Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur***	**2003**	**Provincial (Nova Scotia)**	**Invalidated**
74	*R. v. S.A.B.*	2003	Federal	Upheld
75	*R. v. Malmo-Levine; R. v. Caine*	2003	Federal	Upheld
76	*R. v. Clay*	2003	Federal	Upheld
77	*Suresh v. Canada (Minister of Citizenship and Immigration)*	2002	Federal	Upheld
78	***Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick***	**2002**	**Provincial (New Brunswick)**	**Invalidated**
79	*Lavoie v. Canada*	2002	Federal	Upheld
80	***Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink***	**2002**	**Federal**	**Invalidated**
81	***R. v. Hall***	**2002**	**Federal**	**Invalidated (in part)**
82	***Sauvé v. Canada***	**2002**	**Federal**	**Invalidated**
83	***Ruby v. Canada (Solicitor General)***	**2002**	**Federal**	**Invalidated**
84	*Nova Scotia (Attorney General) v. Walsh*	2002	Provincial (Nova Scotia)	Upheld
85	***R. v. Sharpe***	**2001**	**Federal**	**Invalidated**
86	***R. v. Ruzic***	**2001**	**Federal**	**Invalidated**
87	*R. v. Pan; R. v. Sawyer*	2001	Federal	Upheld
88	*R. v. Advance Cutting & Coring Ltd.*	2001	Provincial (Quebec)	upheld
89	***Dunmore v. Ontario (Attorney General)***	**2001**	**Provincial (Ontario)**	**Invalidated**
90	*Granovsky v. Canada (Minister of Employment and Immigration)*	2000	Federal	Upheld
91	*R. v. Morrisey*	2000	Federal	Upheld
92	*R. v. Darrach*	2000	Federal	Upheld
93	*Winnipeg Child and Family Services v. K.L.W.*	2000	Provincial (Winnipeg)	upheld
94	***Little Sisters Book and Art Emporium v. Canada (Minister of Justice)***	**2000**	**Federal**	**Invalidated (in part)**

Appendix 3 (Legislative Responses)

1	R. v. Lloyd	2016	Federal	Majority 6:3	Repealed
2	Canada (Attorney General) v. Chambre des Notaires du Quebec	2016	Federal	Unanimous	No response
3	R. v. K.R.J.	2016	Federal	Majority 7:2	No response
4	Conference des juges de paix magistrats du Québec v Quebec (Attorney General)	2016	Provincial (Quebec)	Unanimous	No response
5	British Columbia Teachers' Federation v. British Columbia	2016	Provincial (British Columbia)	Majority 7:2	No response
6	***Mounted Police Association of Ontario v. Canada (Attorney General)***	**2015**	**Federal**	**Majority 6:1**	**(An Act respecting labour relations in the federal public sector; Federal Public Sector Labour Relations Act)**
7	***Saskatchewan Federation of Labour v. Saskatchewan***	**2015**	**Provincial (Saskatchewan)**	**Majority 5:2**	**Amended & repealed certain provisions (Amendments to Essential Services Process)**
8	***Carter v. Canada***	**2015**	**Federal**	**Unanimous**	**Bill C-14 An Act to amend the Criminal Code (medical assistance in dying)**
9	*Canada (Attorney General) v. Federation of Law Societies of Canada*	2015	Federal	Majority 5:2	No response
10	*R. v. Nur*	2015	Federal	Majority 6:3	Bill C-69 (Penalties for the Criminal Possession of Firearms Act); did not become law *
11	*R. v. Smith*	2015	Federal	Unanimous	No response
12	*R. v. Appulonappa*	2015	Federal	Unanimous	No response
13	*Canada (Attorney General) v. Whaling*	2014	Federal	Unanimous	No response
14	***Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401***	**2013**	**Provincial (Alberta)**	**Unanimous**	**Amended (Bill 3 Personal Information Amendment Act)**
15	***Canada (Attorney General) v. Bedford***	**2013**	**Federal**	**Unanimous**	**Bill C-36 Protection of Communities and Exploited Persons Act**
16	***R. v. Tse***	**2012**	**Federal**	**Unanimous**	**Amended (Response to the Supreme Court of Canada Decision in R. v. Tse Act)**
17	***R. v. St-Onge Lamoureux***	**2012**	**Federal**	**Majority 5:2**	**Bill C-46: An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts**
18	***Canada (Attorney General) v. PHS Community Services Society***	**2011**	**Federal**	**Unanimous**	**Bill C-2 (An Act to Amend the Controlled Drugs and Substances Act (Respect for Communities Act))**
19	***Nguyen v. Quebec (Education, Recreation and Sports)***	**2009**	**Provincial (Quebec)**	**Unanimous**	**Bill 115 An Act Following upon the court decisions on the language of instruction & Regulations C-11, r. 2.1**
20	***R. v. D.B.***	**2008**	**Federal**	**Majority 5:4**	**Bill C-10 (Safe streets and Communities Act)**
21	***Charkaoui v. Canada (Citizenship and Immigration)***	**2007**	**Federal**	**Unanimous**	**Bill C-3 An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act**
22	*Canada (Attorney General) v. Hislop*	2007	Federal	Unanimous	No response
23	*Health Services and Support - Facilities Subsector Bargaining*	2007	Provincial (British Columbia)	Majority 6:1	Repealed & not replaced

	Assn. v. British Columbia				
24	***Solski (Tutor of) v. Quebec (Attorney General)***	**2005**	**Provincial (Quebec)**	**Unanimous**	**Bill 115 An Act Following upon the court decisions on the language of instruction & Regulations C-11, r. 2.1**
25	***Chaoulli v. Quebec (Attorney General)***	**2005**	**Provincial (Quebec)**	**Majority 4:3**	**Bill 33 (An Act to amend the Act respecting health services and social services and other legislative provisions)**
26	***R. v. Demers***	**2004**	**Federal**	**Unanimous**	**Bill C- 22 An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts, 2005**
27	***Trociuk v. British Columbia (Attorney General)***	**2003**	**Provincial (British Columbia)**	**Unanimous**	**Vital Statistics Amendment Act, 2004**
28	***Figueroa v. Canada (Attorney General)***	**2003**	**Federal**	**Unanimous (on constitutionality)**	**Bill C-3 (Chapter 24) An Act to amend the Canada Elections Act and the Income Tax Act 2004**
29	*Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*	2003	Provincial (Nova Scotia)	Unanimous	No response
30	***Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick***	**2002**	**Provincial (New Brunswick)**	**Majority 5:2**	**Act to Amend the Provincial Court Act 2003, c. 18**
31	*Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*	2002	Federal	Majority 6:3	No response
32	*R. v. Hall*	2002	Federal	Majority 5:4	No response
33	*Sauvé v. Canada*	2002	Federal	Majority 5:4	No response
34	*Ruby v. Canada (Solicitor General)*	2002	Federal	Unanimous	No response
35	*R. v. Sharpe*	2001	Federal	Majority 6:3	No response
36	*R. v. Ruzic*	2001	Federal	Unanimous	No response
37	*Dunmore v. Ontario (Attorney General)*	2001	Provincial (Ontario)	Majority 8:1	Agricultural Employees Protection Act, 2002, c. 16
38	*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*	2000	Federal	Majority 6:3	No response